No. 91-1648

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Supreme Court of the United States

October Term, 1991

THE SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES, RABBI MARVIN HIER, THE AMERICAN JEWISH COMMITTEE AND THE CITY OF LOS ANGELES,
Petitioners,

v.

VIVIANA McCALDEN, AS ADMINISTRATOR OF THE ESTATE OF DAVID McCALDEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment permit a federal court to hold political or religious organizations and their leaders liable for damages based not on incitement to imminent lawless action, but on "threats" that consist merely of statements about a public counter-demonstration that the defendants intend to organize to protest a speech the plaintiff plans to make insisting that the Holocaust was a hoax perpetrated by Jews?

2. May the fact that statements about a planned public counter-demonstration are communicated privately rather than publicly be invoked to strip them of the First Amendment protection to which they would otherwise be entitled?

3. Does the First Amendment permit a federal court to impose damage liability on a municipality for adopting a resolution urging others to boycott a planned public presentation of these "Holocaust revisionist" notions, and for refusing to support any organization that provides a forum for those views?

4. Given the chilling effect of retaliatory litigation, does the First Amendment permit an indulgent standard of pleading for complaints seeking damages from political or religious opponents based on statements they make on matters of public importance?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the California Library Association and the Westin Hotel Company, d/b/a Westin Bonaventure Hotel, also appeared as defendants in the District Court and as defendants-appellees in the Court of Appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER CIRCUITS BY HOLDING THAT INDIVIDUALS AND ORGANIZATIONS MAY BE HELD LIABLE FOR SPEECH THAT "THREATENS", IN THE MIDST OF A HEATED POLITICAL DISPUTE, TO HOLD A PUBLIC COUNTER-DEMONSTRATION IF THEIR DEMANDS ARE NOT MET. 8

A. Even Liberally Construed, The Complaint Alleges Only A "Threat" To Hold A Political Demonstration. 8

B. Advocating Or "Threatening" A Demonstration Is Speech Protected By The First Amendment, Even If There Is A Risk That Any Such Demonstration Might Cause Some Disruption, Property Damage Or Injury. 10

C. The Ninth Circuit's Attempt To Evade *Brandenburg* And *Claiborne Hardware* By Distinguishing Between Public And Private Speech Conflicts With This Court's Unanimous Decision in *Givhan v. Western Line Consolidated School District*. 14

II. THE NINTH CIRCUIT THREATENS FIRST AMENDMENT RIGHTS BY ALLOWING THE CITY OF LOS ANGELES TO BE HELD LIABLE FOR CRITICIZING RESPONDENT'S IDEAS AND FOR REFUSING TO SUPPORT A CONFERENCE THAT WOULD PROVIDE A FORUM FOR THOSE IDEAS. 16

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS BY REFUSING TO APPLY A HEIGHTENED STANDARD OF SCRUTINY TO A COMPLAINT SEEKING DAMAGES FOR SPEECH THAT IS *PRIMA FACIE* PROTECTED BY THE FIRST AMENDMENT. 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases:

Alliance to End Repression v. Chicago, 742 F.2d 1007 (7th Cir. 1984) 12,14

American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) 13,14

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 20

Barger v. Playboy Enterprises, Inc., 564 F.Supp. 1151 (N.D.Cal. 1983) 21

Barrows v. Jackson, 346 U.S. 249 (1953) 18

Block v. Meese, 793 F.2d 1303 (D.C.Cir. 1986) 17

Boone v. Redevelopment Agency of San Jose, 841 F.2d 886 (9th Cir.), *cert. denied*, 109 S.Ct. 489 (1988) 20

TABLE OF AUTHORITIES (cont.)

Brandenburg v. Ohio, 395 U.S. 444 (1969) . . . . . *passim*

City of Madison v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) 18

Connick v. Myers, 461 U.S. 138 (1983) 16

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 18

Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd., 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) 20

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 16

Gooding v. Wilson, 405 U.S. 518 (1972) 13

Gregory v. Ashcroft, 111 S.Ct. 2395 (1991) 19

Herbert v. Lando, 603 F.Supp. 983 (S.D.N.Y. 1985), *rev'd in part on other grounds*, 781 F.2d 298 (2d Cir. 1986) 20

Hess v. Indiana, 414 U.S. 105 (1973) 13

Houston v. Hill, 482 U.S. 451 (1987) 12

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 19

Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171 (10th Cir. 1982) 20

Lamont v. Postmaster General, 381 U.S. 301 (1965) 18

TABLE OF AUTHORITIES (cont.)

Landmark Communications, Inc. v. Virginia,
435 U.S. 829 (1978) 13

McDonald v. Smith, 472 U.S. 479 (1985) 15, 19

Mark Aero, Inc. v. Trans World Airlines, Inc.,
580 F.2d 288 (8th Cir. 1978) 20

Meese v. Keene, 481 U.S. 465 (1987) 17

NAACP v. Button, 371 U.S. 415 (1963) 19

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) . . . . . *passim*

New York Times v. Sullivan, 376 U.S. 254 (1964) 8,14,19

Noto v. United States, 367 U.S. 290 (1961) 11

Omni Resource Development Corp. v. Conoco, Inc.,
739 F.2d 1412 (9th Cir. 1984) 20

Regan v. Taxation with Representation,
461 U.S. 540 (1983) 18

Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.,
60 U.S.L.W. 4029 (U.S. Dec. 10, 1991) 15

Spanish Int'l Communications Corp. v. Leibowitz,
608 F.Supp. 178 (S.D.Fla.), *aff'd*, 778 F.2d 791
(11th Cir. 1985) 20

Terminiello v. Chicago, 337 U.S. 1 (1949) 12

Time, Inc. v. Hill, 385 U.S. 374 (1967) 20

United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976) 12

TABLE OF AUTHORITIES (cont.)

Watts v. United States, 394 U.S. 705 (1969) 12

Whitney v. California, 274 U.S. 357 (1927) 12,13

Wurtz v. Risley, 719 F.2d 1438 (9th Cir. 1983) 11,16

Constitutional Provisions, Statutes and Rules:

U.S. Constitution, First Amendment . . . . . *passim*

U.S. Constitution, Art. IV, § 4, cl. 1 19

42 U.S.C. § 1983 5

Unruh Civil Rights Act, Cal.Civ.Code § 51.7 5

Fed.R.App.P. 4(a) 5

Fed.R.Civ.P. 12(b)(6) 2,4,21

Fed.R.Civ.P. 58 5

Fed.R.Civ.P. 79(a) 5

OPINIONS BELOW

The initial, unamended version of the opinion of the United States Court of Appeals for the Ninth Circuit is reported at 919 F.2d 538. The amended opinion of the panel majority (Norris and D. W. Nelson, JJ.) and the opinions of the five Circuit Judges who dissented from the refusal to rehear the case en banc (Kozinski, Alarcon, Reinhardt, T. G. Nelson and Noonan, JJ.) are as yet unreported. The amended opinion is reprinted as Appendix A, and the dissents from denial of rehearing appear in Appendix F. The memorandum opinion of the United States District Court for the Central District of California is unreported and is reprinted as Appendix B.

JURISDICTION

The decision of the Court of Appeals was originally filed on November 20, 1990. (A37).[1] A timely petition for rehearing was denied (and the Court of Appeals filed its amended decision) on January 24, 1992. *See* Appendix F. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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[1] Citations to the appendices printed with this petition will be styled "A__."

STATEMENT OF THE CASE

Judge Alex Kozinski, joined by Judges Alarcon, Reinhardt and T. G. Nelson, wrote in dissent below that "[t]his is a case of exceptional importance":

> What began as a political dispute among widely divergent factions has been converted into a lawsuit; thwarted in the political arena, plaintiff McCalden has chosen to continue the battle by dragging his adversaries into court. The fundamental question presented is how much — or rather how little — he need allege before the courts will entertain his case, putting the defendants to the burden, expense and risk of litigation.

(Kozinski, J., dissenting from the denial of rehearing en banc) (A39). (A total of five judges dissented: Judge Reinhardt and Judge Noonan also filed separate dissenting opinions).

Respondent McCalden, doing business as "Truth Missions," Complaint ¶ 3 (A61-62), is a self-proclaimed "Holocaust revisionist" who proselytizes the view that the historical record of Nazis murdering millions of Jews and other civilians is a hoax. Complaint ¶ 54. (A72).[1] In order to promote his notions, respondent contracted for exhibit space at the California Library Association's ("CLA") 1984 conference at the Westin Bonaventure Hotel ("Westin") and also reserved a room to present a program at the conference. (A1, A19-20). Allegedly confronted by passionate opposition from petitioners and others, the CLA canceled McCalden's contracts for participation in its conference. (A2, A20).

Respondent brought suit in federal District Court against the petitioners: the Simon Wiesenthal Center for Holocaust Studies ("Center"), an organization which operates a Holocaust museum and

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[1] Since the case was appealed from the District Court's dismissal under Fed.R.Civ.P. 12(b)(6), the facts set forth here are derived from the allegations of the Complaint, which is reprinted in Appendix H. Plaintiff David McCalden died after the case was argued to the Ninth Circuit and Viviana McCalden was substituted as plaintiff by order of the court below. (A1 n.*).

is dedicated to opposing racism and anti-Semitism; the Center's Dean, Rabbi Marvin Hier; the American Jewish Committee ("AJC"); and the City of Los Angeles. Also named as defendants were the Westin Hotel and the CLA. Respondent charged "that defendants participated in a deliberate and concerted effort through the application of political pressure and threats of political sanctions to force CLA to cancel its contracts with plaintiff." (A20).

Respondent alleged that a resolution urging the CLA to oust McCalden from the conference was introduced before the Los Angeles City Council by a councilman "at the specific instance and request of one of his constituents," Rabbi Hier, who was allegedly acting in concert with the Center, the AJC, Los Angeles Mayor Tom Bradley and others. Complaint ¶ 27 (A66).[3] Respondent further claimed that petitioners and public officials including the Mayor, California Assembly Speaker Willie Brown, State Senate President David Roberti and Assembly Majority Floor Leader Mike Roos engaged in "a conspiracy to pressure defendant CLA to cancel its contracts with plaintiff." Complaint ¶ 36 (A68). Mayor Bradley allegedly "instructed members of the Los Angeles Library Commission to boycott defendant CLA's Annual Conference, as an additional means of pressuring defendant CLA." *Ibid.* The City Council's unanimous resolution "officially severed City participation in [the CLA conference] in protest of the CLA's having contracted with plaintiff, and for the purpose of creating a threat of political and economic sanctions that would force defendant CLA to cancel its contracts." *Id.* at ¶ 26 (A65). Respondent charged that the City Council's resolution violated the Constitution "through public

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[3] The unanimously adopted City resolution provided in pertinent part:

> [W]hile we must protect the rights of all Americans to express their views, there is no obligation to provide the forces of hatred such respected platforms. We therefore call on the California Library Association to recognize their grave error of judgment and urge them to remove these individuals from their program. Further, that whatever City participation in the California Library Association, formal or informal, be immediately severed in protest of the California Library Association action. [*Sic*].

condemnation and pressure on defendant CLA" that interfered with his rights of free speech and due process. *Id.* at ¶ 42 (A69).

The Complaint thus makes plain that McCalden was locked in a political struggle with petitioners, waged through the normal channels: "the sole purpose of defendant Hier's and/or Wiesenthal's and/or AJC's action was to induce defendant CLA by application of *political pressure* and *threats of political sanctions* to cancel its contracts with plaintiff." ¶ 37 (A68)(emphasis added). Thus the AJC allegedly "requested a meeting" with the CLA "with the purpose and intent of pressuring defendant CLA to cancel its contracts with plaintiff." ¶ 22 (A64). The Center also rented a conference room at the Westin Hotel adjacent to the room reserved for McCalden's presentation, allegedly with "the principal, if not sole purpose" of positioning "itself and defendants Hier and AJC so as to be able to disrupt plaintiff's program should it take place." *Id.* at ¶ 30 (A66). Petitioners allegedly conspired to induce the CLA to cancel respondent's contracts "by threatening and *organizing a demonstration* which [they] knew and intended would create a reasonable probability of property damage and of violence against plaintiff and members of defendant CLA." *Id.* at ¶ 32 (A67)(emphasis added). For example, petitioners allegedly "allowed information concerning plaintiff's exhibit and program to pass to members of certain militant, violence prone Jewish organizations who thereupon made plans to attend and disrupt plaintiff's program." *Id.* at ¶ 34 (A68).

Despite these allegations of protests and of plots to disrupt, the Complaint alleged that, "[h]owever, the real and only substantial reason for defendant CLA's decision to cancel its contracts with plaintiff was its concern about loss of support, including financial support, as a result of . . . [the] resolution of the Los Angeles City Council." *Id.* at ¶ 16 (A64). Petitioners allegedly informed the CLA that if the contracts were not canceled, "the CLA would be 'wiped out.'" *Id.* at ¶ 24 (A65).

The District Court dismissed the Complaint under Fed.R.Civ.P. 12(b)(6). (Appendix B). The Court of Appeals for the Ninth Circuit reversed in part and reinstated respondent's claims against Rabbi Hier, the Wiesenthal Center and the AJC for violation of Califor-

nia's Unruh Civil Rights Act, Cal.Civ.Code § 51.7 (A7-11), and the claims against all the petitioners for tortious interference with contractual relations (A6-7) and deprivation of unspecified federal rights in violation of 42 U.S.C. § 1983. (A13-14).[4] Although the Ninth Circuit acknowledged in a footnote that "none of the [petitioners] can be liable for petitioning the Los Angeles City Council or for organizing a demonstration against McCalden" because "[t]hese activities are plainly protected by the First Amendment" (A7 n.4), the court below nevertheless held that the expression alleged in the complaint was actionable:

> Finally, some appellees raise a First Amendment defense . . . , arguing that there can be no liability for alleged threats of violence unless they were "directed to inciting or producing imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)(per curiam); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982). We reject this argument. Both *Brandenburg* and *Claiborne* involved public speeches advocating violence, not privately communicated threats of violence as are alleged here.

(A10-11).[5] The Court of Appeals itself found that, even "[l]iberally construed," the Complaint contains only "one allegation of a specific

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[4] The Ninth Circuit also reinstated respondent's breach of contract claim against the CLA (A5-6), which is not at issue here. The Court of Appeals' affirmance of the District Court's dismissal of respondent's other federal claims (A11-13) is likewise not in issue. The court below held that respondent's appeal was timely under Fed.R.App.P. 4(a) because the District Court had failed to enter its judgment in compliance with Fed.R.Civ.P. 58 and 79(a), which require that the judgment be set forth in a separate document and properly entered by the clerk. (A3-4). Although Judge Fletcher dissented on this jurisdictional issue (A15), no other judge of the Ninth Circuit agreed with her or joined her dissent when the vote was taken on the suggestion for rehearing en banc. Indeed, Judge Fletcher herself voted to deny rehearing and to reject the suggestion for rehearing en banc. (A38).

[5] Although raised by petitioners in their initial appellate briefs, the First Amendment issues were not discussed by the Ninth Circuit panel majority until it amended its opinion, after petitioners had sought rehearing, to include this brief discussion. *See* Appendix F.

threat": the AJC's alleged statement to the CLA, with the supposed "knowledge and approval" of Rabbi Hier and the Wiesenthal Center, that if the contracts with McCalden were not canceled, "'[d]efendant CLA's 1984 Annual Conference would be disrupted, there would be damage to property and the CLA would be "wiped out."'" (A9) (quoting Complaint ¶ 24 (A65)). This lone allegation, without more, was held sufficient to subject petitioners to a trial on liability for threatening to organize a political demonstration.

This holding produced vigorous dissents from the denial of rehearing en banc. Judge Kozinski, joined by Judges Alarcon, Reinhardt and T.G. Nelson, wrote that "[i]f plaintiff wants to claim that speech uttered by defendants in pursuit of a political objective is extortion, he must allege facts that, if proven, would amount to extortion. One searches McCalden's 24-page complaint in vain for such allegations." (A41). "McCalden's *only* elaboration on his will-o'-the-wisp allegations is that defendants were 'threatening and organizing a *demonstration* which [they] knew and intended would create a reasonable probability of property damage and of violence.' Complaint ¶ 32." (A39)(emphasis added by Judge Kozinski).

> By letting McCalden proceed with a lawsuit that hinges on this allegation, the panel holds that a political organization can be sued for extortion on the basis of statements about a demonstration it intends to conduct at some time in the future. This is astonishing in light of *Brandenburg* [*v. Ohio*, 395 U.S. 444 (1969)], which held that a state may not prohibit "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447.

(A43) (Kozinski, J., dissenting).

Judge Reinhardt likewise took issue with the panel majority's indulgent pleading standard:

> Whenever political discourse . . . is the basis for a lawsuit, the courts have a constitutional duty to ensure that the litigation does not become the instrument by which legitimate

> political speech or activity is stifled. . . . The content, manner, and setting of the offending speech must be pled with specificity in order to allow a court to determine whether the alleged speech is protected.

(A47-48)(Reinhardt, J., dissenting). *See also id.* at A58 (Noonan, J., dissenting)("an indulgent standard of pleading is inappropriate where the plaintiff is seeking damages for the speech of the defendant").

Both Judge Kozinski and Judge Reinhardt rejected the panel majority's belated attempt to dismiss *Brandenburg* and *Claiborne Hardware* as inapposite cases involving "public speeches advocating violence, not privately communicated threats of violence as are alleged here." (A10-11). "What matters for purposes of the First Amendment is not whether the statements are uttered in public or in private, but whether — on the basis of what is alleged in the complaint — the speech in question can fairly be characterized as extortion." (A44)(Kozinski, J., dissenting). The issue, the dissenters reasoned, is not how the alleged threat was communicated, nor even "whether the recipient of the threat, the California Library Association, had a reasonable fear that the threat would be carried out," but whether "the alleged threat, a threat to hold a public demonstration, is the type on which liability may be founded. . . . If the content of the speech is protected, that is the end of our inquiry." (A50) (Reinhardt, J., dissenting). Nevertheless, the panel majority held that "because the [petitioners] allegedly chose to communicate with the CLA in private their otherwise protected speech is stripped of its constitutional safeguards." *Id.* at 49.

Judge Reinhardt reasoned that "[t]he threat to conduct a demonstration does not lose its constitutional protection because demonstrations generally, or this demonstration in particular, may be disruptive or likely to result in property damage." (A51). Indeed, "[t]o advise the target of a planned political demonstration that the event is likely to result in disruption and property damage is, in many instances, simply to state the obvious." *Id.* at 53. The unremarkable fact that "[p]ublic demonstrations often carry with them the risk of violence" is something "we endure as part of life in a free society; it is not a sufficient reason . . . to stifle free expres-

sion." (A43) (Kozinski, J., dissenting). As Judge Kozinski explained, "While genuine threats of violence are not constitutionally protected, I had thought it inconceivable that one could be held liable for planning and organizing a political demonstration." *Id.* at A39. Yet this is all that the Complaint alleges: "Read in its entirety, not by plucking phrases out of context, McCalden's complaint alleges nothing more than the type of 'uninhibited, robust, and wide-open' debate on public issues the First Amendment protects." *Id.* at A45 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Judge Kozinski's dissent, joined by three other members of the Ninth Circuit, came to this conclusion (A39):

> By allowing McCalden to proceed with his lawsuit, my colleagues turn back the clock to the dark days of the not-so-distant past when the judicial process was routinely used to crush opposing viewpoints — an era I, like most observers, believed had ended with *Brandenburg v. Ohio*.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER CIRCUITS BY HOLDING THAT INDIVIDUALS AND ORGANIZATIONS MAY BE HELD LIABLE FOR SPEECH THAT "THREATENS", IN THE MIDST OF A HEATED POLITICAL DISPUTE, TO HOLD A PUBLIC COUNTER-DEMONSTRATION IF THEIR DEMANDS ARE NOT MET.

A. Even Liberally Construed, The Complaint Alleges Only A "Threat" To Hold A Political Demonstration.

Respondent's Complaint leaves no doubt that McCalden, the Wiesenthal Center, Rabbi Hier and the AJC were "locked in an intense political struggle, waged through the normal political channels." (A42)(Kozinski, J., dissenting). Specifically, respondent alleges that "the sole purpose of Defendant[s] [Hier, Center and

AJC] was to induce Defendant CLA by application of political pressure and threats of political sanctions to cancel its contracts with Plaintiff and to prevent Plaintiff from expressing his views to CLA members." Complaint ¶ 37 (A68). Every allegation of any kind of "threat" is interwoven with allegations of "political pressure" or "economic and political sanctions." *Id.* at ¶ 53 (A72). *See, e.g., id.* at ¶¶ 26, 38.

The panel and dissenting opinions below were unanimous that, as the panel majority put it, even "[l]iberally construed, the complaint contains one allegation of a specific threat" (A9): the AJC's alleged statement to the CLA, supposedly "at the urging and request" of Rabbi Hier and the Center, that if the contracts with respondent were not canceled, the CLA's conference "would be disrupted, there would be damage to property and the CLA would be 'wiped out.'" Complaint ¶ 24 (A65). The court below interpreted this threat by reference to the allegation that the petitioners "intended to disrupt his presentation by creating a *demonstration* that [they] knew and intended 'would create a reasonable probability of property damage and of violence against Plaintiff and members of Defendant CLA.'" (A10)(emphasis added).

There is thus agreement that a "demonstration" was all that was supposedly threatened. *See* A10 (panel opinion); A42 (Kozinski, J., dissenting); A50, A53-54 (Reinhardt, J., dissenting). "There are no allegations of threats of personal violence directed at particular individuals." (A54)(Reinhardt, J., dissenting). Respondent "does not claim that defendants threatened to break anybody's kneecaps, or to plant a bomb, or to have goons set fire to his exhibit. . . . One searches McCalden's 24-page complaint in vain" for allegations "that, if proven, would amount to extortion." (A41)(Kozinski, J., dissenting). Since the Complaint alleges only that the threatened demonstration "would create a reasonable probability" of violence, ¶ 32 (A67), it is clear that respondent was not even *allegedly* threatened with violence at the hands of defendants or of persons acting at their direction, for threatening action of that sort would have been threatening *violence as such*, not merely threatening to create a situation bearing a "reasonable probability" of violence. During a colloquy with the District Court, respondent underscored that he was alleging "threats" to organize a potentially volatile

demonstration rather than threats of direct violence: "A threat is a situation. If you create the situation, and it is likely to cause injury or damage, you have created the threat." Tr. of Proceedings on Nov. 17, 1986 (Excerpts of Record filed with the Court of Appeals at 86). As Judges Kozinski, Alarcon, Reinhardt and Nelson stated:

> Nowhere . . . does McCalden give a single example of an actionable threat of violence. McCalden's *only* elaboration on his will-o'-the-wisp allegations is that defendants were 'threatening and organizing a *demonstration* which [they] knew and intended would create a reasonable probability of property damage and of violence.' Complaint ¶ 32. While genuine threats of violence are not constitutionally protected, I had thought it inconceivable that one could be held liable for planning and organizing a political demonstration.

(A39)(Kozinski, J., dissenting)(emphasis in original).

B. Advocating Or "Threatening" A Demonstration Is Speech Protected By The First Amendment, Even If There Is A Risk That Any Such Demonstration Might Cause Some Disruption, Property Damage Or Injury.

As Judge Kozinski explained, the court below has held that:

> [A] political organization can be sued for extortion on the basis of statements about a demonstration it intends to conduct at some time in the future. This is astonishing in light of *Brandenburg* [*v. Ohio*, 395 U.S. 444 (1969)(per curiam)], which held that a state may not prohibit 'advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' 395 U.S. at 447.

(A43)(Kozinski, J., dissenting). That standard was affirmed in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), where this Court unanimously held that although a state may impose liability for genuine threats of violence, a boycott organizer's vow

to "break [the] damn necks" of boycott violators was, in the context of a political dispute, politically motivated hyperbole fully protected by the First Amendment. *Id.* at 928. Since the "threat" to enforce boycott discipline was not an incitement to imminent lawless action and did not "authorize[], ratif[y] or directly threaten[] acts of violence," no civil liability could lie. *Id.* at 928-29.[6] The same is even more plainly true here, where the warning allegedly delivered to the CLA by the AJC was not a threat to break necks but merely a "threat" to hold a demonstration that could possibly damage property, cause injury and, by discouraging financial and political support from Los Angeles and other cities, "wipe out" the CLA. *See* Complaint ¶¶ 16, 24, 32.[7]

Relying on *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983), the court below nevertheless ruled that the speech alleged here was actionable to the extent that it had "a reasonable tendency to produce in the victim [the CLA] a fear that the threat will be carried out." (A11). But as *Wurtz* made clear, the only threats that can be punished or suppressed by the state are threats "to commit a criminal act," 719 F.2d at 1441 — there, a threat of rape made in an alley to a woman walking home from work alone. Rape is a crime; organizing a political demonstration is not.[8] The only

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[6] *See also Noto v. United States*, 367 U.S. 290, 296 (1961) (First Amendment protects statements that "he was the kind of guy they hoped to shoot one day," "I will see the time we can stand a person like this S.O.B. against the wall and shoot him").

[7] Even if the AJC could be held liable for making this alleged statement — which it cannot — such liability obviously could not extend to Rabbi Hier or the Wiesenthal Center, since they are not alleged to have made any such "threats" but only to have somehow "urged," "requested" or "approved of" the AJC's statements. Complaint ¶ 24 (A65).

[8] Indeed, *Wurtz* itself recognized that the First Amendment protects the "civil rights activist" who threatens a restaurant owner with a "boycott" unless he desegregates, as well as "[t]hreats of sit-ins, marches in the street, mass picketing and other such activities," even though such threats are "frequently threats to commit acts proscribed by law." 719 F.2d at 1442. *Wurtz* held that judicial punishment of "the mere communication of a threat" to commit such infractions would violate the First Amendment. *Id.*

threats that the law may constitutionally punish are "unequivocal, unconditional and specific expressions of intention immediately to inflict injury" — "only such threats, in short, as are of the same nature as those threats which are . . . 'properly punished every day under statutes prohibiting extortion, blackmail and assault without consideration of First Amendment issues.'" *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976). As Judge Kozinski observed, the alleged statements of the AJC, the Center and Rabbi Hier "were aimed at achieving a political objective, not exacting protection payments." (A45).[9]

To be sure, the First Amendment provides no license to commit extortion in the course of organizing a protest, but when "threats" are allegedly uttered in the course of protected political advocacy or activity, a different standard applies. *Claiborne Hardware*, 458 U.S. at 927-28; *Watts v. United States*, 394 U.S. 705, 708 (1969). For the very "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). *See also Houston v. Hill*, 482 U.S. 451, 461-63 (1987). As Justice Brandeis wrote long ago, "[t]he fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression." *Whitney v. California*, 274 U.S. 357, 378 (1927)(Brandeis and Holmes, JJ., concurring). After all, "[m]uch speech is dangerous. . . . [P]olitical theorists whose papers might start political movements that lead to riots, speakers whose ideas attract violent protesters, all these and more leave loss in their wake." *American*

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[9] The dissent below noted that Judge Posner, writing for the Seventh Circuit en banc, interpreted *Brandenburg*, *Claiborne Hardware* and *Watts v. United States*, 394 U.S. 705 (1969), "to cover situations far more extreme than that here" (A44 n.5)(Kozinski, J., dissenting), including an announcement by a "sect of religious fanatics . . . that unless Chicagoans renounce their sinful ways it may become necessary to poison the city's water supply," or a "vow" by "white supremacists" to "take revenge on Chicago for electing a black mayor," or threats of "terrorist activities" by "the leaders of a newly formed organization of Puerto Rican separatists . . . if the United States does not grant Puerto Rico independence soon." *Alliance to End Repression v. Chicago*, 742 F.2d 1007, 1014 (7th Cir. 1984).

Booksellers Ass'n v. Hudnut, 771 F.2d 323, 333 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

Despite these dangers, this Court has unanimously adhered to the "'working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.'. . . 'The danger must not be remote or even probable; it must immediately imperil.'" *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978). It is not enough that the speech "is 'calculated to create disturbances of the peace'" or that it includes an element of "congregating with others 'with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby.'" *Gooding v. Wilson*, 405 U.S. 518, 527 (1972). In particular, this Court has held that *Brandenburg* forbids judicial punishment of speech that "amounted to nothing more than advocacy of illegal action at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

Yet not even that much can be said of the alleged speech that the Ninth Circuit held actionable here. For the Complaint does not allege that petitioners advocated future illegal conduct, only that they threatened to hold a future demonstration that in turn carried a reasonable probability of leading, as Justice Brandeis put it, to "some violence or . . . destruction of property." *Whitney v. California*, 274 U.S. at 37 (concurring opinion). As the dissenters observed below, these are "the normal incidents of a highly emotional and volatile political protest." (A54)(Reinhardt, J., dissenting). "To advise the target of a planned political demonstration that the event is likely to result in disruption and property damage is, in many instances, simply to state the obvious." *Id.* at A53. "Political demonstrations may not be banned because they are likely to be disruptive or result in property damage; and, even more so, a threat to hold such a demonstration cannot justify the imposition of civil or criminal liability." *Id.* at 54.

Indeed, "the threat of a demonstration is even further removed from unprotected activity than the act itself — because the threat of political protest is speech in its purest form." (A56)(Reinhardt, J., dissenting). If, under *Brandenburg* and its progeny, one cannot be

held liable for convening a demonstration and advocating violent crimes — so long as that advocacy is not directed to inciting and likely to incite imminent lawless action — then *a fortiori* one cannot be held liable for communicating to one's opponents a contingency plan for a future counter-demonstration which, one notes, may get out of hand. "If the propensity of large groups of angry people to harm property (and sometimes each other) is sufficient to give the target a cause of action against the organizers of the protest, we will have done much to silence the 'vehement, caustic, and sometimes unpleasantly sharp attacks' heretofore protected by the First Amendment. *See Sullivan*, 376 U.S. at 270." (A43)(Kozinski, J., dissenting).

The Ninth Circuit's dangerous departure from established First Amendment principles has produced a conflict in the circuits, as Judges Kozinski, Alarcon, Reinhardt and Nelson noted below: in light of *Alliance to End Repression v. Chicago*, 742 F.2d 1007 (7th Cir. 1984), and *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), "there is little doubt this case would have come out differently had it been brought in the Seventh Circuit." (A45 n.5). Plenary review by this Court is in order.

C. The Ninth Circuit's Attempt To Evade *Brandenburg* And *Claiborne Hardware* By Distinguishing Between Public And Private Speech Conflicts With This Court's Unanimous Decision in *Givhan v. Western Line Consolidated School District*.

The court below "brushes aside *Brandenburg* and *Claiborne Hardware* as cases 'involving public speeches advocating violence, not privately communicated threats of violence as are alleged here.'" (A44)(Kozinski, J., dissenting, quoting majority at A10-11).

> It appears from the majority opinion that . . . if defendants Rabbi Hier, the Simon Wiesenthal Center, and the American Jewish Committee had notified defendant CLA of their intentions by means of a public communication, the conduct would be protected and dismissal of the complaint would be

> required. However, the majority concludes that because the defendants allegedly chose to communicate with the CLA in private their otherwise protected speech is stripped of its constitutional safeguards.

(A49)(Reinhardt, J., dissenting).

This purported distinction is baseless. "What matters for purposes of the First Amendment is not whether the statements are uttered in public or in private, but whether — on the basis of what is alleged in the complaint — the speech in question can fairly be characterized as extortion." (A44)(Kozinski, J., dissenting). "[T]he principal issue on which the majority goes astray is whether the alleged threat . . . to hold a public demonstration is the type on which liability may be founded. . . . If the content of the speech is protected, that is the end of our inquiry. *See generally Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 60 U.S.L.W. 4029, 4034-35 (U.S. Dec. 10, 1991)(Kennedy, J., concurring in the judgment)." (A50)(Reinhardt, J., dissenting).[10] "There is no persuasive reason for according greater or lesser protection on matters of public importance depending on whether" the expression is spoken to a few "neighbors across the backyard fence," published "in the local newspaper," or sent in a private letter to a single individual. *McDonald v. Smith*, 472 U.S. 479, 490 (1985)(Brennan, J., concurring).[11]

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[10] The panel majority seemed to believe that this Court had drawn a distinction in *Claiborne Hardware* between Charles Evers' threats of neck-breaking (made in public speeches and hence protected) and unspecified "threats of violence" by unnamed boycott enforcers (presumably made in private and hence actionable). (A11). That belief is in error. "The distinction is not, as the majority asserts, between public and private speech. Instead, it is between a 'threat' to conduct a boycott which the Court holds constitutionally protected even though the sponsor made it clear that violence might well play a part, and more specific, individual acts or threats of direct violent conduct which the Court states are unprotected." (A51 n.2)(Reinhardt, J., dissenting).

[11] The panel majority's only supposedly contrary authority is *Wurtz v. Risley*. (A11). Unlike the threat of rape whispered in that case to a lone woman in an alley at night, the threat alleged here — to hold a political counter-demonstration against anti-semitism and Nazi apologists —

Most importantly, the Ninth Circuit's distinction between publicly and privately communicated speech was squarely repudiated by this Court in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). There the lower court likewise concluded "that because petitioner had privately expressed her complaints and opinions . . . her expression was not protected under the First Amendment." *Id.* at 413. In an opinion by Justice Rehnquist, the Court unanimously rejected "this erroneous view of the First Amendment," holding that "private expression" enjoys "constitutional protection." *Id.* Since this is the Ninth Circuit's sole basis for distinguishing *Brandenburg* and *Claiborne Hardware*, the decision below merits plenary review if not summary reversal. For as Judge Kozinski wrote for the dissenters below (A45):

> By dismissing *Brandenburg* and *Claiborne Hardware* in a few scant phrases, my colleagues deliver a body blow to the principle that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Claiborne Hardware*, 458 U.S. at 913).

II. THE NINTH CIRCUIT THREATENS FIRST AMENDMENT RIGHTS BY ALLOWING THE CITY OF LOS ANGELES TO BE HELD LIABLE FOR CRITICIZING RESPONDENT'S IDEAS AND FOR REFUSING TO SUPPORT A CONFERENCE THAT WOULD PROVIDE A FORUM FOR THOSE IDEAS.

Respondent seeks damages from Los Angeles pursuant to claims for alleged tortious interference with contractual relations and for alleged violation of his federal civil rights, on the basis of the City Council's unanimous adoption of a resolution (a) denouncing the CLA's decision to include respondent's exhibit in its conference and (b) severing Los Angeles' participation in and support of the CLA

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obviously falls into the category of "expression on public issues." *NAACP v. Claiborne Hardware*, 458 U.S. at 913.

in protest of that decision. Complaint ¶¶ 26-28. By remanding these claims for trial, the Ninth Circuit panel proceeded as if Los Angeles' speech were unprotected by the First Amendment. This is a novel and disturbing proposition worthy of this Court's review.

Surely "government expression . . . would *always* seem to fall in the category of political expression, the most protected form of speech," *Block v. Meese*, 793 F.2d 1303, 1314 (D.C.Cir. 1986) (Scalia, J., joined by Wright and Bork, JJ.)(emphasis in original). "[F]reedom of speech 'does not mean that government must be ideologically neutral,' . . . or prevent government from 'add[ing] its own voice to the many that it must tolerate.'" *Block v Meese*, 793 F.2d at 1314 (citation omitted).[12]

Petitioners are aware of no prior case "suggest[ing] that 'uninhibited, robust and wide-open debate' consists of debate from which the government is excluded, or an 'uninhibited marketplace of ideas' one in which the government's wares cannot be advertised." *Id.* at 1313. Los Angeles is just as free to condemn what it perceives as anti-semitism as it is to outlaw invidious discrimination in housing or employment. As then-Judge Scalia put it in *Block v. Meese*, 793 F.2d at 1313:

> A rule excluding official . . . criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; . . . to make war on Hitler's Germany, but not to denounce Nazism. It is difficult to imagine how many governmental pronouncements, dating from the beginning of the Republic, would have been unconstitutional on that view of things.

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[12] In *Meese v. Keene*, 481 U.S. 465, 484 & n.18 (1987), this Court noted that it had "no occasion here to decide the permissible scope of Congress' 'right to speak,'" but that the "implications of judicial parsing of statutory language to determine if Congress' word choices violate the First Amendment are discussed in *Block v. Meese*, 793 F.2d at 1313-14."

Respondent bases his claim in part on the allegation that "the real and only substantial reason for defendant CLA's decision to cancel its contracts with plaintiff was its concern about loss of support, including financial support, as a result of . . . [the] resolution of the Los Angeles City Council." Complaint ¶ 16 (A64). But surely Los Angeles' freedom of expression includes the right to refuse to participate in or to support the CLA's conference and other activities. The City's decision not to subsidize the CLA's involvement with respondent's exhibit and ideas does not infringe respondent's First Amendment rights, *see Regan v. Taxation with Representation*, 461 U.S. 540 (1983) — indeed, the Amendment protects the City's decision to engage in and to promote a boycott of the CLA as a political protest. *See NAACP v. Claiborne Hardware*, 458 U.S. at 915.

Although the Ninth Circuit panel noted in passing that Rabbi Hier, the Center and the AJC "can[not] be liable for petitioning the Los Angeles City Council" (A7 n.4), the panel's decision nevertheless to expose the *City itself* to liability for enacting a resolution and for allegedly communicating with citizens who opposed respondent's planned exhibit, *see* Complaint ¶¶ 36, 38 (A68-69), implicates the right to petition. It would be a Pyrrhic victory for the First Amendment to hold that although citizens generally cannot be held liable for petitioning the government to take action against others, *see, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the government itself may be liable if it speaks in response to the people's will.[13] Since the right

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[13] Indeed, it is the First Amendment right of those who petition and implore the government, and not only the First Amendment rights of the government and those for whom it speaks, that would be abridged by any such imposition of liability upon the government as speaker. *See, e.g., Barrows v. Jackson*, 346 U.S. 249, 258-59 (1953) (just as prospective black home buyers have right not to be subjected to racially restrictive covenants, white sellers of housing may invoke this right in challenging their own damage liability for violation of such covenants); *cf. Lamont v. Postmaster General*, 381 U.S. 301 (1965) (First Amendment protects right to receive information from others); *City of Madison v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (First Amendment imposes severe limits on government's power to restrict who may speak in official public meetings).

to petition is implicit in the very idea of republican government, *McDonald v. Smith*, 472 U.S. at 482, *see* U.S. Const. Art. IV, § 4, cl. 1 (Republican Form of Government); *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2399, 2402 (1991), respondent's cause of action against Los Angeles, now sanctioned by the court below, threatens the central mechanism of democracy itself.

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS BY REFUSING TO APPLY A HEIGHTENED STANDARD OF SCRUTINY TO A COMPLAINT SEEKING DAMAGES FOR SPEECH THAT IS *PRIMA FACIE* PROTECTED BY THE FIRST AMENDMENT.

As argued above, the Ninth Circuit panel's decision merits review because, even construed liberally in plaintiff's favor under the most relaxed standard of notice pleading, the Complaint seeks to recover damages for speech on matters of public importance that is protected by the First Amendment. As the dissenting opinions below confirm, those arguments in no way depend upon invocation of any special standard of scrutiny. (A42-46)(Kozinski, J., dissenting); (A47-48, A49-54)(Reinhardt, J., dissenting). Nevertheless, several Courts of Appeals have held, as Judge Noonan put it in his dissenting opinion, that "an indulgent standard of pleading is inappropriate where the plaintiff is seeking damages for the speech of the defendant." (A58). That issue independently warrants issuance of the writ in this case.

This Court has long recognized that although civil litigation can be a powerful First Amendment tool for vindicating important rights, *see, e.g., NAACP v. Button*, 371 U.S. 415 (1963), it can also be a threat to First Amendment values when used as a bludgeon for striking at political or religious adversaries. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). The "pall of fear and timidity imposed [by the threat of litigation] upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Sullivan*, 376 U.S. at 278. "Speech may be chilled not only by an award of damages but also

by simply allowing a case to go to trial." (A48) (Reinhardt, J., dissenting). *See, e.g. Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("Fear of large verdicts in damage suits . . . even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.'").

In order to vindicate the "principle that the freedoms of expression must be ringed about with adequate bulwarks," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963), the federal courts have, as all five of the dissenting judges noted below (A41, A48, A58), developed a rule that "where a plaintiff seeks damages . . . for conduct which is *prima facie* protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd.*, 542 F.2d 1076, 1082-83 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).[14]

Judge Kozinski and the other dissenters concluded that respondent's Complaint "falls far short of the First Amendment's specificity requirement. He alleges nothing — nothing at all — that could arguably place defendants' speech outside the protective umbrella of the First Amendment." (A41). *See also* A54-56 (Reinhardt, J., dissenting); A58 (Noonan, J., dissenting). "If plaintiff wants to claim that speech uttered by defendants in pursuit of a political objective is extortion, he must allege facts that, if proven, would amount to extortion. One searches McCalden's 24-page complaint in vain for such allegations." (A41)(Kozinski, J., dissenting). The

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[14] *Accord Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894-95, 897 (9th Cir.), *cert. denied*, 109 S.Ct. 489 (1988); *Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984)(Kennedy, J.); *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 297 & n.35 (8th Cir. 1978); *Spanish Int'l Communications Corp. v. Leibowitz*, 608 F.Supp. 178, 182-84 (S.D.Fla.), *aff'd*, 778 F.2d 791 (11th Cir. 1985); *Herbert v. Lando*, 603 F.Supp. 983, 989 (S.D.N.Y. 1985), *rev'd in part on other grounds*, 781 F.2d 298 (2d Cir. 1986).

dissents also underscored the disturbing implications of the decision below:

> If these defendants — operating at the core of the First Amendment — can be subjected to a lawsuit for extortion based on a handful of conclusory allegations, one wonders and worries who else can so easily be dragged into the quagmire of litigation. . . . [For example,] I had thought it inconceivable that a complaint by a public figure claiming nothing more than that he was "libeled with malice" would survive a motion to dismiss under Rule 12(b)(6). *See, e.g., Barger v. Playboy Enterprises, Inc.*, 564 F.Supp. 1151, 1154-57 (N.D.Cal. 1983). Now I'm not so sure; if "threats of violence" is a talisman that can whisk a complaint past a motion to dismiss, why not "libel" and "malice" as well? My colleagues' utter disregard for the First Amendment's specificity requirement will bring a chill of discomfort to publishers, editors and political commentators.

(A42)(Kozinski, J., joined by Alarcon, Reinhardt and Nelson, JJ., dissenting).

Leaving the press aside, the rights of citizens and organizations with something to say about public issues are even more directly affected by the decision below. Any group that saw its public demonstrations or expressive activity met by threats of a counter-demonstration by its political opponents could sue those opponents for extortion. Flagburners could sue the American Legion if a planned flag immolation was deterred by a threatened convening of flag supporters. The Ku Klux Klan could sue the NAACP for calling out sufficient members to persuade the Klan to cancel a proposed cross-burning. Publishers of "adult magazines" could sue religiously motivated consumer groups for staging a boycott that induced retailers to refuse to market the publishers' wares.

The decision below conflicts sharply with the decisions of other circuits applying more exacting First Amendment scrutiny of complaints that seek damages for speech on public issues. Moreover, the "majority's routine treatment of the plaintiff's complaint — as if the action involved nothing more than a dispute over a bill

of lading — is at odds with the last thirty years of First Amendment jurisprudence and is reason enough to hear this case en banc." (A49) (Reinhardt, J., dissenting). Petitioners respectfully submit that it is also reason enough to warrant plenary review on certiorari.

CONCLUSION

That the petitioners here may have conveyed their reactions to plaintiff's views in impassioned terms cannot deprive them of First Amendment protection. Judge Kozinski was plainly correct when he wrote:

> No one disputes McCalden's right to say his piece, repugnant though his message be. . . . Surely, however, we may not withhold the same privilege of uninhibited, emotionally charged expression from the targets of McCalden's attack. Those who carry the mark of Auschwitz tattooed on their forearms, or who survived Treblinka, Dachau or Buchenwald; who were hunted down like animals in the streets of Warsaw; who saw loved ones perish during Kristallnacht or in frozen boxcars on their way to the death camps that are the shame and horror of modern times — they cannot be expected to react calmly, with deliberation, with gentility to one who would tarnish the memory of those butchered in the Holocaust by pretending the whole thing never happened. . . . Surely *their* anger, *their* disgust, *their* anguish also have a protected place in the wide-open arena of our public discourse. To let plaintiff use a state civil rights statute (and possibly a federal one as well) to punish these defendants for threatening to hold a demonstration voicing their righteous indignation is not only a perversion of those civil rights laws, it is also a devaluation of the precious rights granted all of us by the First Amendment.

(A46-47) (Kozinski, J., joined by Alarcon, Reinhardt and T. G. Nelson, JJ., dissenting) (emphasis in original).

In order to vindicate those First Amendment rights and to resolve important conflicts between the decision below and the decisions of this Court and of other Courts of Appeals, plenary review is in order.

Respectfully submitted,

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April 9, 1992

TABLE OF APPENDICES

APPENDIX A: Ninth Circuit's Amended opinion in *McCalden v. California Library Ass'n et al.*, No. 88-5727 (Jan. 24, 1992) A1

APPENDIX B: District Court Opinion in *McCalden*, No. CV86-4755 (C.D.Cal., Feb. 11, 1987) A18

APPENDIX C: District Court Order dismissing entire complaint as to most defendants with prejudice (Mar. 24, 1987) A31

APPENDIX D: District Court stipulation and order dismissing remaining claims against City of Los Angeles without prejudice (Mar. 31, 1987) . . . A32

APPENDIX E: District Court order denying plaintiff's motion for entry of judgment (July 30, 1987) A33

APPENDIX F: Ninth Circuit order denying petition for rehearing, rejecting suggestion for rehearing en banc, and amending previously issued opinion, together with dissents from the order rejecting the suggestion for rehearing en banc (Jan. 24, 1992) A37

APPENDIX G: Notice of Appeal to Ninth Circuit (Feb. 10, 1988) A59

APPENDIX H: Plaintiff's Second Amended Complaint (Feb. 9, 1987) A61

APPENDIX A

VIVIANA MCCALDEN,* *Plaintiff-Appellant*, v. CALIFORNIA LIBRARY ASSOCIATION; CITY OF LOS ANGELES; AMERICAN JEWISH COMMITTEE; MARVIN HIER; SIMON WIESENTHAL CENTER, INC.; WESTIN HOTEL CO., dba Westin Bonaventure Hotel, *Defendants-Appellees*.

No. 88-5727

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

May 3, 1989, Argued and Submitted, Pasadena, California
January 24, 1992, Filed

OPINION

NORRIS, Circuit Judge:

Appellant David McCalden filed an eight-claim second amended complaint alleging breach of contract, tortious interference with contract, deprivation of constitutional rights, and violation of California's Unruh Civil Rights Act. The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. McCalden appeals.

According to the allegations of his complaint, appellant is a member of an organization that engages in research, writing, publication and discussion questioning the historical accuracy of the accepted portrayal of the Holocaust. In July 1984, appellant entered into a contract with appellee California Library Association ("CLA") to rent exhibit space at the association's annual conference scheduled for December 1984 at the Westin Bonaventure Hotel in Los Angeles. Appellant described the exhibit on his application form as one of "Publishers of revisionist, libertarian and atheist research. Specializing in the defense of civil liberties for unpopular causes."

In August 1984, appellant entered into an additional written contract with appellee CLA for the presentation of a program entitled "Free Speech and the Holocaust" - An overview from several speakers of the severe censorship and intellectual terrorism which inhibits any objective, open discussion of this controversial subject" at the same conference.

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* By this court's order of July 15, 1991, Viviana McCalden was substituted as plaintiff-appellant for David McCalden.

After appellant entered into the contracts with CLA, appellees allegedly engaged in a series of acts designed to prevent him from presenting his proposed exhibit and program. He alleges that appellee American Jewish Committee ("AJC") contacted representatives of the CLA and informed them that if appellant's contracts were not cancelled, the conference would be disrupted, property would be damaged, and the CLA would be "wiped out." Appellee City of Los Angeles ("City"), acting through its City Council, passed a unanimous resolution to request that the CLA remove appellant from the conference and to sever the City's participation with the conference. This resolution was allegedly based upon representations of Councilman Yaroslavsky at the specific request of one of his constituents, appellee Rabbi Marvin Hier. In addition, the Los Angeles Police Department informed the Director of the CLA that it had received threats against his life if he allowed appellant to participate in the conference. The City also informed the Director that it would be unable to provide adequate police protection or security measures for the conference.

Appellee Simon Wiesenthal Center, at the direction of Rabbi Hier and with the approval of the AJC, allegedly rented a conference room from appellee Westin Bonaventure Hotel which was adjacent to the room in which appellant's program was scheduled to take place. Appellant alleges that the principal reason Simon Wiesenthal Center rented the adjacent room was to position itself so as to disrupt his program. He also alleges that Westin Bonaventure Hotel knew the rental of the room to the Simon Wiesenthal Center would constitute a breach of its agreement with appellee CLA to provide adequate security.

Appellant alleges that he believes appellees deliberately and in concert caused CLA to cancel its contracts with him, through the application of political pressure and threats.

I. *Jurisdiction*

Initially, we must determine whether we have jurisdiction to hear this appeal. Appellant must file a notice of appeal within 30 days after entry of judgment. Fed. R. App. P. 4(a)(1). A timely notice of appeal is jurisdictional. *Allah v. Superior Court*, 871 F.2d 887, 890 n.1 (9th Cir. 1989). Appellees claim that appellant's appeal is untimely.

On February 11, 1987, the district court dismissed appellant's first, second, fifth, sixth and seventh claims with prejudice. The court granted leave to amend with respect to the fourth claim, but cautioned that it would "impose sanctions for the filing of a frivolous pleading." Excerpts of Record ("ER") at 15. On March 24, 1987, the district court dismissed the fourth claim with prejudice, because appellant had not amended his complaint within the time allowed. On March 31, 1987, appellant stipulated to dismiss without prejudice his third and eighth claims against the city. With this final stipulation, each of his eight claims had been dismissed. On June 19, 1987, appellant filed a motion requesting the court to enter judgment in his case. On July 30, 1987, the court, in an order, refused to enter judgment on the ground that its former orders constituted entry of judgment. Appellant filed a notice of appeal February 10, 1988.

Rule 4(a)(6) provides that the time for appeal does not start running until a judgment is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure, that is, until it is set forth in a separate document and properly entered by the clerk of the court.[1]

Appellees argue, and the district court held, that the time for appeal began to run when the court filed the final stipulation on March 31, 1987. The court relied on *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980), and *Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981), for authority that a case becomes appealable once all claims against all defendants have been finally dismissed. While it is true that *Baker* and *Anderson* are authority for the proposition that appellant's case became appealable on March 31, 1987, and therefore that appellant *could* have appealed after that date, it does not necessarily follow that the 30-day time period began to run on that date. The time period begins to run only by the entry of a "judgment . . . set forth on a separate document."[2] Fed.

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[1] Fed. R. Civ. P. 58 states in relevant part: "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."

[2] Although a separate judgment is required for the time limit to appeal to begin running, it does not follow that a separate judgment is necessary to create appellate jurisdiction; the parties may waive the requirement, avoiding the " 'pointless exercise of dismissing the appeal and waiting for the district

R. Civ. P. 58. The reason for this rule, so apt in this case, was stated by the Supreme Court in *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978)(per curiam):

> The separate-document requirement was . . . intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely.

For purposes of Rule 4(a), in order to make the finality of a case as unequivocal as possible, our circuit has held that the separate-document rule be "mechanically applied," or else a "party will not ordinarily be found to have exceeded any of the time periods [of Rule 4(a)]." *Allah v. Superior Court*, 871 F.2d at 890 (quoting *Vernon*, 811 F.2d at 1276). *See also Carter v. Beverly Hills Sav. & Loan Ass'n*, 884 F.2d 1186 (9th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3834 (1990)(civil minutes entered in docket book do not constitute final judgment unless separate order filed and all formalities observed).

The district court's various orders did not constitute an "entry of judgment" in this case, because no separate document of judgment was entered. Although the district court's July 30 order refusing to enter judgment gave appellant notice that the district court considered his claims to be finally dismissed, the order also suggested, mistakenly, that appellant's time for appeal had already run. Since the very purpose of Rule 4(a) is to avoid confusion, we cannot hold, Magritte-like, that an order stating that "this is not an entry of judgment" is nonetheless an entry of judgment. Our circuit has held fast to a mechanical application of the "separate judgment" rule, requiring all formalities to be observed. *See Carter, supra*. Therefore, the time for appeal never began to run, and appellant's appeal is timely.

We review *de novo* the dismissal of an action under Rule 12(b)(6) for failure to state a claim. *Patee v. Pacific Northwest Bell Tel. Co.*, 803 F.2d 476, 477 (9th Cir. 1986).

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court clerk to enter a separate judgment.'" *Allah v. Superior Court*, 871 F.2d at 890 n.1 (quoting *Vernon v. Heckler*, 811 F.2d 1274, 1276-77 (9th Cir. 1987)); *Bankers Trust Co. v. Mallis*, 435 U.S. at 385.

II. *Breach of Contract Claim*

Appellant asserts a state law breach of contract claim against the CLA, claiming that it breached its two contracts with appellant, one for the rental of exhibition space and the second for the rental of a conference room in which appellant planned to present a program expressing his views on the Holocaust. In support of this claim, appellant alleged that the CLA cancelled the contract ostensibly because of threats of disruption to the convention if appellant were allowed to exhibit and speak, but that "the real and only substantial reason for defendant CLA's decision to cancel its contracts with plaintiff was its concern about loss of support . . . as a result of action taken by defendant CITY OF LOS ANGELES . . . ." ER at 21. In later claims, however, appellant alleged that the CLA received substantial threats of violence and that the police declined or were unable to provide adequate protection. *See, e.g.*, ER at 23-31.

The district court dismissed the breach of contract claim, holding that appellant had pled an impossibility defense to his own claim by his allegations in other sections of the complaint. ER at 4-7. We cannot agree.

The issue here is one of alternative pleading. Federal Rule of Civil Procedure 8(e)(2) explicitly provides, in relevant part, that "[a] party may . . . state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds." Fed. R. Civ. P. 8(e)(2). Our circuit has held that "[i]n light of the liberal pleading policy embodied in Rule 8(e)(2) . . . a pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case." *Molsbergen v. United States*, 757 F.2d 1016, 1019 (9th Cir.), *cert. dismissed*, 473 U.S. 934 (1985). Following *Molsbergen* and the clear mandate of Rule 8(e)(2) requires that we reverse the dismissal of appellant's breach of contract claim, because the district court's dismissal was based on an impermissibly strict reading of his complaint.

In any event, the allegations in appellant's complaint do not plead a complete impossibility defense to his own claim. For a complaint to be dismissed because the allegations give rise to an affirmative defense "the defense clearly must appear on the face of the pleading." 5A C. Wright & A. Miller, Federal Practice and

Procedure, § 1357, at 348-49 (2d ed. 1990). A party invoking the impossibility defense must show that he used reasonable efforts to surmount the obstacles which prevented performance. *See Oosten v. Hay Haulers Dairy Employees & Helpers Union*, 45 Cal. 2d 784, 789, 291 P.2d 17, 21 (1955) (defendant invoking impossibility defense required to show affirmatively that performance was impossible or unreasonably expensive despite exercise of skill, diligence and good faith), *cert. denied sub nom Knudsen Creamery Co. of California v. Oosten*, 351 U.S. 937 (1956); *see also* B. Witkin, Summary of California Law § 786 (1987); Restatement (Second) of Contracts § 261 comment (d) (1981). Here, appellant's complaint does *not* clearly state that the CLA took reasonable measures to obviate the danger from groups that opposed appellant (*e.g.*, by insisting on police protection, hiring extra security guards or instituting special security procedures.) Hence, when we consider the allegations in all sections of the complaint, appellant does not plead a complete impossibility defense. Accordingly, we vacate the dismissal of the breach of contract claim.

III. *Interference with Contractual Relationship Claim*

Appellant's second claim alleges that the City, the AJC, Rabbi Hier, the Wiesenthal Center and Westin tortiously interfered with appellant's contractual relationship with the CLA. The district court dismissed this claim with prejudice, holding that this cause of action required the plaintiff to allege that " 'some identifiable pecuniary or economic benefit' accrue[d] to defendants that formerly accrued to plaintiff." ER at 7 (quoting *Garter-Bare Co. v. Munsingwear Inc.*, 723 F.2d 707, 716 (9th Cir. 1984).

As we read California law, pecuniary or economic benefit is not an element of the tort of interference with a contractual relationship. A recent California Supreme Court case, which the district court may not have had the benefit of, has not identified this element when listing the essential components of this claim. *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990) (listing elements which plaintiff must plead to state cause of action for intentional interference with contract, and not including accrual of economic benefit to defendant).[3] Since such benefit is not an

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[3] We express no opinion as to the elements of the related tort of

essential component of this claim, appellant's failure to plead it does not defeat his claim, which must be reinstated.[4]

IV. *Unruh Act Claim*

The district court dismissed with prejudice appellant's claim under § 51.7 of the California Civil Code, on the ground that appellant did not fall within a group protected by that statute.

Cal. Civ. Code § 51.7(a) as amended in 1984, provides in relevant part, as follows:

> All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.

The district court found that a group of "Holocaust revisionists" was not a political affiliation under the terms of the statute. However, appellant claims on appeal that he is nonetheless a member of a class that is subject to invidious discrimination, whether or not labeled political, and that because the statute's list is meant to be "illustrative rather than restrictive," he should be protected by it.

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interference with prospective economic advantage. *See, e.g., Garter-Bare Co. V. Munsingwear Inc.*, 723 F.2d 707, 716 (9th Cir. 1984) (quoting *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1449, 1456 (9th Cir. 1983))(identifying as essential element of tort of interference with prospective economic advantage as "some identifiable pecuniary or economic benefit [that] must accrue to [defendant] that formerly accrued to [plaintiff]"); *see also Pacific Gas*, 50 Cal. 3d at 1126 (noting differences between these two torts).

[4] It is clear, of course, that none of the appellees can be liable for petitioning the Los Angeles City Council or for organizing a demonstration against McCalden. These activities are plainly protected by the First Amendment. *See Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984); *Brownville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988). Speech or conduct that falls outside the protection of the First Amendment, on the other hand, may expose appellees to liability for interference with contractual relations.

Appellees argue that the "illustrative rather than restrictive" language on which appellant relies was added to the statute *after* the events in this case, and was an enlargement of the statute's protections. The limited legislative history of the amendment is ambiguous as to whether it was intended to clarify the section or to alter it. In addition, there is only one published California case that does more than mention § 51.7 in passing, and it does not address the issue raised by the district court here. (*Coon v. Joseph*, 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (1987)). The California courts, however, have considered § 51.7 to be a "component" of the earlier-enacted Unruh Civil Rights Act, Cal. Civ. Code § 51. *See Long v. Valentino*, 216 Cal. App. 3d 1287, 1293, _ Cal. Rptr. _ (1989)(as modified on rehearing).

The Unruh Act, Cal. Civ. Code § 51, prohibits discrimination by business establishments on the basis of sex, race, color, religion, ancestry, or national origin. Despite this more restricted list, and the absence of any legislative statement that the list is not exclusive, the California courts have construed § 51's list of classes as "illustrative rather than restrictive." *In re Cox*, 3 Cal. 3d 205, 216, 474 P.2d 992, 999, 90 Cal. Rptr. 24, 31 (1970). Given that the legislative amendment to § 51.7 tracks this language, and the *Cox* case was cited in the Assembly Bill analysis,[5] it is reasonable to infer that the amendment was a codification of *Cox*'s pronouncement. At the very least, the California courts' approach to § 51 guides us in the analysis of § 51.7 as an indication of what the California courts might do in this case. *See S & R Metals, Inc. v. C. Itoh & Co.*, 859 F.2d 814, 816 (9th Cir. 1988) (in absence of express guidance, federal court must apply state law as it predicts state's highest court would).

The California courts have defined the classes of the Unruh Act very broadly to include "individuals who wear long hair or unconventional dress, who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union," *In re Cox*, 3 Cal. 3d at 217-218, students, families with children, welfare recipients, and occupational groups. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 736, 640 P.2d 115, 124, 180 Cal. Rptr. 496, 505, *cert. denied* 459 U.S. 858 (1982).

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[5] Appellant's Brief, Addendum at 16.

Appellant describes himself as a member of a class of "Holocaust Revisionists," who are subject to invidious discrimination because they spread unpopular views about the history of the Holocaust. ER 35. Appellees claim that appellant's expulsion from the CLA conference was not due to his being a member of an unpopular group, but was because of his "spreading lies." They argue that lying is conduct, not membership in a group, and therefore appellant does not fall within the protection of the Unruh Act. *See Frantz v. Blackwell*, 189 Cal. App. 3d 91, 96, 234 Cal. Rptr. 178, 181 (1987) (discrimination reasonably based on a person's conduct, as opposed to his status, not prohibited by the Unruh Act; Act aims for individualized treatment).

On a motion to dismiss, however, the court must deem the complaint's allegations to be true. *Williford v. California*, 352 F.2d 474, 475-76 (9th Cir. 1965). Appellant alleges that he is a member of a group espousing unpopular views. A John Birch Society or ACLU member could fall in the same kind of class, and the *Cox* decision is explicit that those groups would receive the protection of the Unruh Act.

Appellees also argue that the complaint does not sufficiently allege intimidation by threat of violence committed to plaintiff's person or property, as required by § 51.7. Liberally construed, the complaint contains one allegation of a specific threat - the AJC's alleged statement to the CLA, "at the urging and request and with the knowledge, approval and cooperation of Defendants Marvin Hier . . . and Simon Wiesenthal Center" that if the contracts with appellant were not canceled, [d]efendant CLA's 1984 Annual Conference would be disrupted, there would be damage to property and the CLA would be 'wiped out.' " ER at 23. Appellees claim that this language can be construed only as a threat against the CLA, not against the person or property of appellant. They cite *Coon v. Joseph*, 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (1987), in which the court held that the plaintiff, a gay man, could not state a § 51.7 claim against a bus driver by alleging that his lover was verbally abused and struck in his presence. The court stated:

> The complaint establishes that no violence or intimidation was committed or threatened against [plaintiff's] person and thus no cause of action exists in his own right. Following [plaintiff's] argument, any person would have the right to

> recover damages for himself or herself whenever the rights of any other human being of similar . . . sexual orientation were threatened.

Id. at 1277-78.

On a motion to dismiss, all reasonable inferences are to be drawn in favor of the non-moving party. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). Appellant alleges that the appellees intended to disrupt his presentation by creating a demonstration that appellees knew and intended "would create a reasonable probability of property damage and of violence against Plaintiff and members of Defendant CLA." ER 10-11. In view of all the facts pled, it is reasonable to infer that any property damage or injury threatened could be directed against appellant, because the allegations clearly link the alleged threat to an intent to disrupt appellant's exhibit and program. This case must therefore be distinguished from *Coon*, because it can be reasonably inferred from the complaint that the threatened violence was directed against appellant.

Although appellees suggest that the statute must be read as requiring the threat to be conveyed directly to the person threatened,[6] the statute requires only that the plaintiff be intimidated by threat of violence committed against his person or property. In construing a remedial state statute, on a motion to dismiss, in the absence of clear state court direction, this court is reluctant to read any unnecessary restrictions into § 51.7.

Finally, some appellees raise a First Amendment defense to this cause of action, arguing that there can be no liability for alleged threats of violence unless they were "directed to inciting or producing imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982). We reject this argument. Both *Brandenburg* and *Claiborne* involved public speeches advocating violence, not privately communicated threats of violence as are

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[6] The only mention in the complaint of a threat conveyed to McCalden was the second-hand information that the CLA "had received threats of substantial disruption to the conference and to the property of *other* exhibitors should [McCalden's] program be allowed to be presented." E.R. 21 (emphasis added).

alleged here. Privately communicated threats have traditionally been punishable where they have "a reasonable tendency to produce in the victim a fear that the threat will be carried out." *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983).

That appellees were engaging in protected expressive activities at the same time and to the same end as the alleged threats of violence does not immunize appellees from liability for the alleged threats. In *Claiborne*, the Court held that NAACP official Charles Evers could not be held liable for a public speech, but the Court stated unequivocally that individuals who "engaged in violence or threats of violence . . . may be held responsible for the injuries that they caused." *Claiborne*, 458 U.S. at 926. Nor does the fact that appellees were politically motivated immunize them from liability if they in fact engaged in threats of violence. The boycotters who threatened and engaged in violence in *Claiborne* were no less politically motivated than Charles Evers whose public speech the Supreme Court held to be protected by the First Amendment. *Id.*; *see also Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987) ("a statement that amounted to a threat to kill the President would not be protected by the First Amendment"). Appellant may not be able to support the allegations in his complaint, but those allegations are sufficient to survive a motion to dismiss.

V. *Section 1985(3) Claim*

Appellant also asserts a claim under 42 U.S.C. § 1985(3),[7] averring that five of the defendants[8] conspired to deprive him of his civil rights "solely because of his membership in a class known as Holocaust revisionists," a "class" the members of which he claims are subject to invidious discrimination because of their views. ER at 35. We must decide whether appellant's self-identified "class"

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[7] The statute reads, in relevant part:
If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[8] Defendant CLA was not named in this part of the complaint.

falls within the ambit of classes § 1985(3) has been interpreted to protect.[9]

Building upon the Supreme Court's jurisprudence on this issue,[10] our circuit has distilled a rule that to state a claim under § 1985(3) "the plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights." *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1519 (9th Cir. 1987); *see also Trerice v. Pedersen*, 769 F.2d 1398, 1402-03 (9th Cir. 1985) (principle underlying § 1985(3) is governmental determination that some groups require and warrant special federal assistance in protecting their civil rights); *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (per curiam) (same); *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 72 (9th Cir.) (same), *cert. denied*, 454 U.S. 967 (1981); *DeSantis v. Pacific Telephone & Telegraph Co., Inc.*, 608 F.2d 327, 332-33 (1979) (same). It is against this standard that appellant's claim must be tested.

Appellant attempts to fulfill § 1985(3)'s class-based animus requirement by alleging animus against the class of individuals holding particular unpopular historical views. Given our circuit's standard for fulfilling § 1985(3)'s requirement of class-based animus, we cannot accept his argument that the animus against the class of "Holocaust revisionists" satisfies this requirement as our circuit has interpreted it. Appellant makes no argument that Holocaust revisionists have been singled out for special federal protection. We therefore affirm the dismissal of appellant's § 1985(3) claim.

VI. *Section 1986 Claim*

As appellant himself concedes, "[a] claim can be stated under § 1986 only if the complaint contains a valid claim under § 1985."

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[9] The requirement that an actionable conspiracy must feature class-based animus was enunciated by the Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). For the other elements of a Section 1985(3) action, none of which are treated here, see *Griffin*, 403 U.S. at 102-03.

[10] *See United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983)(limiting types of class-based animus fulfilling element of Section 1985(3) claims); *Griffin*, 403 U.S. 88 (1971) (setting forth original requirement of class-based animus).

Appellant's Brief at 60. *See, e.g., Karim-Panahi v. Los Angeles Police Dep.*, 839 F.2d 621, 626 (9th Cir. 1988). Thus, our affirmance of the dismissal of appellant's § 1985(3) claim requires us to affirm as well the dismissal of his claim under § 1986.

VII. *Section 1983 Claim*

In its order of February 11, the district court dismissed appellant's fourth claim without prejudice, on the ground that it failed to state the "Constitutional or statutory basis for the alleged wrong." ER at 10. This claim was dismissed with prejudice on March 24 on the ground that appellant had not attempted to amend his complaint.

The district court's February 11 dismissal without prejudice was error. Appellee is not required to state the statutory or constitutional basis for his claim, only the facts underlying it. *See Haddock v. Board of Dental Examiners of California*, 777 F.2d 462, 464 (9th Cir. 1985) (complaint "should not be dismissed if it states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory"). Moreover, appellant explicitly mentions 42 U.S.C. § 1983 in the first paragraph of his complaint, which is incorporated by reference in his fourth claim, and his fourth claim tracks the language of § 1983. On remand, the district court should consider whether appellant has stated a claim under § 1983.[11]

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[11] Appellees urge that we must reach the merits of whether appellant has stated a § 1983 claim, citing *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). While they are correct that an appellate court must affirm a district court's decision if correct, even though the district court's reasoning is flawed, we have already held that the district court's judgment must be reversed in part and the case remanded for further proceedings. Thus, the rationale for the *Helvering* rule that it "would be wasteful to send a case back to a lower court to reinstate a decision which it had already made," *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), is inapplicable. Because the § 1983 claims here may involve constitutional issues that have not been adequately briefed on appeal, we exercise our discretion to allow the district court to consider these claims in the first instance. *See I.A. Durbin, Inc., v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1552-53 (11th Cir. 1986) (having determined that district court's dismissal of some claims was improper, court refused to reach merits of other constitutional claims and merely pointed out district court's improper reasoning, because constitutional issues were inadequately briefed, and because of general principle against unnecessary decision of constitutional questions.)

The City argues that appellant's failure to amend precludes his appeal, because he has, by his silence, acquiesced in the earlier dismissal without prejudice. However, appellant is not required to amend in order to preserve his right to appeal. When one is granted leave to amend a pleading, she may elect to stand on her pleading and appeal, if the other requirements for a final, appealable judgment are satisfied. *See* 15 C. Wright & A. Miller, Federal Practice and Procedure § 3914 (1976); 3 J. Moore, Federal Practice ¶ 15.11 (2nd Ed. 1989).

VIII. *Motion for Reassignment*

Appellant moves that this case be remanded to a different district judge on the ground that he believes Judge Marshall to be biased against him. As evidence of this alleged bias, appellant complains that the district court 1) mischaracterized his views; 2) intentionally refused to enter judgment in order to delay appellant's appeal; 3) improperly threatened appellant with sanctions in the event that a third amended complaint was frivolous; 4) improperly ordered appellant to show cause why his remaining claims against Los Angeles should not be dismissed, when there was no evidence of lack of prosecution; 5) ignored appellant's application to file documents pending admission of his counsel to practice in the Central District of California; and 6) falsely accused counsel of making an improper communication to the court.

Remand by this court to a different district judge, in the absence of proof of personal bias, is granted only in "unusual circumstances." *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1523 (9th Cir. 1985). In making this determination, we may consider

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id. (quoting *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979). Adverse rulings alone are not sufficient to require recusal,

even if the number of such rulings is extraordinarily high. *Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1341 (9th Cir. 1984). The instant case varies markedly from *United States v. Jacobs*, 855 F.2d 652, 656-57 (9th Cir. 1988), cited by appellant. In *Jacobs*, in addition to making erroneous rulings, the district judge had repeatedly disparaged the movant's case and counsel, and had offered advice to the opponent.

The examples of the district court's conduct appellant gives here do not come close to a showing of bias. Appellant's motion for reassignment is denied.

IX. *Conclusion*

We affirm the district court's dismissal of appellant's claims under § 1985 and § 1986; we reverse the district court's dismissal of the contract, interference with contract, and Unruh Act claims; we vacate the district court's order dismissing the § 1983 claims, and we remand for further proceedings consistent with this opinion. Finally, we deny appellant's motion that the case be remanded to a different district judge.

FLETCHER, Circuit Judge, Dissenting:

I respectfully dissent. We should not reach the merits of this appeal. Rule 4 requires that an appellant file a notice of appeal within 30 days after a final judgment has been entered in accordance with Fed. R. Civ. P. 58. Fed. R. App. P. 4(a)(1), (6). Absent a timely filed notice of appeal, we have no jurisdiction. *Miller v. Sumner*, 872 F.2d 287 (9th Cir. 1989); *Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1983) (en banc).

The district court dismissed McCalden's last claim on March 31, 1987, almost a full year before McCalden filed his notice of appeal. Moreover, the district court, by order on July 30, 1987, more than seven months before McCalden filed his appeal, explicitly informed McCalden that the order entered on March 31, 1987 unquestionably and finally disposed of his case and that the court would issue no further judgment. At the very latest, McCalden was obligated to file his notice of appeal within 30 days of this order. McCalden's notice of appeal at a minimum was filed almost six months too late.

The majority holds that the 30-day period for filing an appeal never began to run because the district court failed to enter a final judgment that met the requirements of Fed. R. Civ. P. 58. Specifically, the majority finds that the district court failed to set forth its judgment on a separate piece of paper. *See* Fed. R. Civ. P. 58. This elevates form over policy and, indeed, over all common sense.

The purpose of the separate document rule is to ensure that litigants know precisely when a judgment is final. It therefore removes uncertainty about when litigants must file an appeal. *See* Fed. R. Civ. P. 58 (comment)(separate document requirement instituted to remove uncertainties as to when a judgment is entered); 11 C. Wright & A. Miller, § 2781, at 6 (1973) (describing purpose of Rule 58). The order denying McCalden's request for entry of judgment, entered by the district court on July 30, 1987, fulfills this purpose.[1] It communicates precisely the information that a final judgment is supposed to communicate only it does so explicitly. First, it states that the judgment of the district court with respect to *all* claims is final. Second, it explicitly denies appellant's request for an entry of judgment, and thereby clearly notified McCalden that no further judgment would issue. Once this order was entered,

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[1] The July 30, 1987 Order stated, in relevant part:

"By this order [the March 24, 1987 order dismissing McCalden's fourth claim], the court dismissed with prejudice all of plaintiff's actions against all of the defendants, except for the City of Los Angeles.

Although the above orders dismissing the action with prejudice as to certain claims and certain defendants may not be deemed final without certification pursuant to Rule 54(b), an order of dismissal may be treated as final if the remaining claims have been finalized by subsequent developments. . . . Here, subsequent to the issuance of the orders of February 6 and March 24 dismissing certain claims and certain defendants, plaintiff voluntarily submitted a stipulation entered into with the remaining defendant, the City of Los Angeles to dismiss the action pursuant to F. R. Civ. P. 41(e). This court signed the stipulation on March 26, 1987. The clerk's office filed the order on March 30, 1987 and entered the order on March 31, 1987. Therefore, after the issuance of this order, there were no remaining claims nor defendants to the action.

Although plaintiff would not have been able to appeal his own voluntary dismissal of the last defendant, plaintiff could and should have filed his notice of appeal with respect to the court's orders of February 6 and March 24th shortly after he filed the stipulation dismissing the remaining claims and defendant in this action."

McCalden knew the district court case was over; he had absolutely no reason to delay filing his appeal. His only possible uncertainty was that he might already be too late.

Although the July 30 order does not expressly direct *entry* of judgment on the dismissed claims, it explains that this has already happened. To find this insufficient, indeed, does inappropriately "elevat[e] . . . form over substance." *Hamilton v. Nakai*, 453 F.2d 152, 155 (9th Cir. 1971); *see also United States v. Perez*, 736 F.2d 236, 238 (5th Cir. 1984)(per curiam) ("We are not required to 'mindlessly' apply Rule 58"); *Weinberger v. United States*, 559 F.2d 401, 402 (5th Cir. 1977) (same). In the Supreme Court's words, "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action . . .,' " *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962).

McCalden knew his July 30, 1987 case was over and that the order was the final piece of paper the district court would enter. He should have filed his notice of appeal not later than August 30, 1987. Yet he waited until February of 1988. We should dismiss the appeal for lack of jurisdiction.

APPENDIX B

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,

vs.

CALIFORNIA LIBRARY ASSOCIATION, a California Corporation, CITY OF LOS ANGELES, AMERICAN JEWISH COMMITTEE, a New York Corporation, MARVIN HIER, an individual, WESTIN HOTEL CO. OF UAL, INC., a corporation d/b/a WESTIN BONAVENTURE CENTER, INC., a California corporation, *Defendants*.

No. CV86-4755 CBM

United States District Court, Central District of California

February 11, 1987, Entered

Memorandum Opinion Granting Moving Defendants' Motion to Dismiss.

This matter is before the court on the motions to dismiss the first amended complaint for failure to state a claim filed by defendants California Library Association, American Jewish Committee, Westin Hotel Company, Westin Bonaventure Hotel, Simon Wiesenthal Center, and Rabbi Marvin Hier,[1] and, plaintiff David McCalden's motion to file a second amended complaint to cure certain admitted deficiencies of the first amended complaint.

A hearing was held on November 17, 1986 before the Honorable Consuelo B. Marshall, United States District Court Judge, presiding. The court having considered the pleadings submitted and the arguments of counsel, hereby issues the following memorandum opinion granting plaintiff's motion to file a second amended complaint and granting moving defendants' motion to dismiss.[2]

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[1] The motion for change of venue filed by defendant City of Los Angeles primarily sought to have the action transferred to the Central District of California, and requested in the alternative that the action be dismissed. As the City's motion is centered on the change of venue, it does not raise any arguments concerning the insufficiency of plaintiff's claims.

[2] Due to the circumstances in which the motions came before the court, the court analyzed the proposed second amended complaint in order to assess

FACTS AND PROCEDURAL HISTORY

Plaintiff David McCalden filed his original complaint on October 11, 1985 in the United States District Court of the Eastern District of California, and prior to the fiiing of responsive pleadings, plaintiff filed a first amended complaint on November 27, 1985. Shortly thereafter, defendants filed their respective motions to transfer venue to the United States District Court for the Central District of California contemporaneously with their respective motions to dismiss. The Honorable Raul A. Ramirez granted defendants' motion to transfer venue, and in view of such transfer, ruled that it would be inappropriate to reach the merits of the remaining motions. Accordingly, this action was transferred to the Central District.

After this action was transferred to the Central District of California, plaintiff filed a motion for leave to file a second amended complaint on October 1, 1986 in order to cure certain admitted deficiencies in the first amended complaint.

According to plaintiff's second amended complaint, the following facts are alleged: plaintiff David McCalden, d/b/a/ Truth Missions, is a citizen of the United Kingdom and a legal permanent resident of the United States. Plaintiff is a member of an organization which engages in research, writing, publication and discussion to advocate the position that the Holocaust is merely a hoax and that the genocide of the Jews by the Nazis has never occurred. On or about July 19, 1984, plaintiff entered into a contract with defendant California Library Association (CLA") to rent exhibit space at CLA's 86th Annual Conference scheduled for December 1984 at the Westin Bonaventure Hotel in Los Angeles. Plaintiff described the exhibit on his application form as "Publishers of revisionist, libertarian and atheist research. Specializing in the defense of civil liberties for unpopular causes."

On or about August 17, 1984, plaintiff entered into an additional written contract with defendant CLA for the presentation of a program entitled "Free Speech and the Holocaust - An overview from several speakers of the severe censorship and intellectual

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whether the proposed changes cured the defects raised in defendants' pleadings. Thefore, the court's decision granting defendants' motion to dismiss certain claims therefore applies to those claims enumerated in the second amended complaint.

terrorism which inhibits any objective, open discussion of this controversial subject" at the same conference.

After plaintiff entered into the contracts with CLA and prior to the conference, defendants allegedly engaged in a series of acts designed to prevent plaintiff from presenting his proposed exhibit and oral presentation. Defendant American Jewish Committee contacted representatives of CLA and informed them that if plaintiff's contracts were not cancelled, the conference would be disrupted, property would be damaged, and CLA would be "wiped out." Defendant City of Los Angeles, acting through its City Council, passed an unanimous resolution to request that CLA remove plaintiff from the conference and to sever the City's participation with the conference. This resolution was based upon representations of Councilman Yaroslavsky at the specific request of one of his constituents, defendant Rabbi marvin Hier. In addition, the City of Los Angeles, acting through its Police Department, informed the Director of CLA that they received "real" death threats against him if he should allow plaintiff to participate in the conference and that the City of Los Angeles would be unable to provide adequate police protection or security measures for the conference, participants of the conference, or the CLA representatives.

Defendant Simon Wiesenthal Center, at the direction of Rabbi Hier and with the approval of American Jewish Committee, allegedly rented a conference room from defendants Westin Bonaventure Hotel which was adjacent to the room in which plaintiff's program was scheduled to take place. Plaintiff believes that the principal reason Simon Wiesenthal Center rented the adjacent room was to position itself so as to disrupt plaintiff's program. Plaintiff also believes that Westin Bonaventure Hotel knew the rental of the room to the Simon Wiesenthal Center would constitute a breach of its agreement with defendant CLA to provide adequate security to the conference area.

Plaintiff believes that defendants participated in a deliberate and concerted effort through the application of political pressure and threats of political sanctions to force CLA to cancel its contracts with plaintiff, and as a result of defendants' actions, CLA cancelled plaintiff's exhibit and program.

DISCUSSION

1. Breach of Contract

In the first cause of action, plaintiff alleges that defendant California Library Association breached two contracts with plaintiff; the first contract involved the rental of exhibit space and the second contract involved the presentation of a program at CLA's 86th Annual Conference scheduled for December 1 through 5, 1984, at the Westin Bonaventure Hotel in Los Angeles. Plaintiff's proposed exhibit was entitled "Publishers of revisionist, libertarian and atheist research. Specializing in the defense of civil liberties for unpopular causes." The proposed program was entitled "Free Speech and the Holocaust -- An overview from several speakers of the severe censorship and intellectual terrorism which inhibits any objective, open discussion of this controversial subject."

In the first amended complaint, plaintiff alleges the CLA cancelled its reservation of a booth and conference room as a direct result of threats by third parties to disrupt the conference and injure those who appear. In the second amended complaint, plaintiff amends the pleading to state that CLA,

> indicated that it 'had received threats of substantial disruption to the conference and to the property of other exhibitors should . . . [plaintiff's] program be allowed to be presented.' However, the real and only substantial reason for defendant CLA's decision to cancel its contracts with plaintiff was its concern about loss of support, including financial support, as a result of action taken by defendant City of Los Angeles on or about November 16, 1984, in the form of a resolution of the Los Angeles City Council, a copy of which is attached hereto as Exhibit D and incorporated herein by reference.

Although the new allegations in the second amended complaint state that CLA's conduct was intentional and without legal justification, the allegations of the complaint still indicate the existence of an affirmative defense which appears on the face of the complaint. The complaint avers that CLA was informed by the Los Angeles Police Department that "certain militant, violence prone Jewish organizations" had made "plans to attend and disrupt Plaintiff's program and to disrupt Defendant CLA's conference through demonstrations." The LAPD also informed the Director of

CLA that they had received death threats directed against him, and that they would be "unable to provide adequate police protection or security measures for the CLA's annual conference, for the CLA itself, for the Director of CLA, and for Plaintiff." Information was also allegedly communicated to CLA by representatives of the American Jewish Committee, with the cooperation of Marvin Hier and Simon Wiesenthal Center, Inc., that the conference would be disrupted, property would be damaged and CLA would be "wiped out."

The doctrine of impossibility or impracticability operates in limited circumstances to excuse the promisor from commencing performance, or to discharge the promisor from the contract where performance of the contract will "involve a risk of injury to person or property, of one of the parties or of others, that is disproportionate to the ends to be attained by performance." Restatement of the Law, Contracts, §261(d); *see e.g.*, 1 Witkin, Summary of California law, §600(b). In the present action, the allegations indicate that the performance of the contracts could have involved a risk of injury to individuals and property due to threatened criminal activities by third persons, and that the cancellation of plaintiff's exhibit and conference was necessary to forestall threatened criminal activities by third persons which could have resulted in injury to individuals and damage to property. The acute hazard posed by the risks of violence and disruption therefore operated to excuse CLA from the contract.

Notwithstanding the issue of impossibility or impracticability, the application for an exhibit booth expressly reserves to the California Library Association "the right to restrict exhibits that may be objectionable or to order the removal of any portion of an exhibit which in the judgment of the Association is detrimental to or detracts from the general order of the exhibits." Thus, the application, on its face, expressly permits the CLA to remove or restrict exhibits deemed to be objectionable, and provides an alternative justification for CLA's cancellation of the exhibits.[3]

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[3] The court notes that the reservation in the agreement only applies to the removal of exhibits, and does not apply to cancellation of the conference room.

Accordingly, plaintiff's first cause of action for the alleged breaches of contract shall be dismissed with prejudice.

2. Intereference with Contract.

To adequately allege a claim for intereference with contract, plaintiff must allege the following elements: 1) the existence of a specific economic relationship between plaintiff and third parties that may economically benefit plaintiff; 2) knowledge by the defendants of this relationship; 3) intentional acts by the defendants designed to disrupt the relationship; 4) actual disruption of the relationship; and 5) damages to the plaintiff. *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1449, 1456 (9th Cir. 1983), *citing Buckaloo v. Johnson*, 14 Cal 3d. 815 (1975). Courts have also required that "some identifiable pecuniary or economic benefit" accrue to defendants that formerly accrued to plaintiff. *Garter-Bare Co. v. Munsingwear Inc.*, 723 F.2d 707, 716 (9th Cir. 1984), *citing Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d at 1456. *See De Voto v. Pacific Fidelity Life Insurance Co.*, 618 F.2d 1340, 1348 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980).

Despite case-law to the contrary, plaintiff takes the position that where defendant's intereference is motivated by malice, spite and ill will, he does not need to plead an accrual of an economic benefit to the defendants. Plaintiff relies upon two cases, *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365 (1975) and *Guillory v. Godfrey*, 134 Cal. App. 2d 628 (1955) in support of its position.

In *Gold*, the court held that appellant had adequately stated a cause of action for intentional intereference with plaintiff's prospective employment as a city controller where the complaint alleged that appellees intentionally mailed a deceptive pamphlet to prospective voters prior to the election which gave the appearance that a different candidate was endorsed by the Democratic Party. As a result of this intentional intereference, plaintiff was not elected to the position. This case is inopposite to plaintiff's contention since the pecuniary or competitive advantage obtained by the defendant and lost by the plaintiff was the election to the position of the city controller.

In *Guillory*, the court affirmed the judgment in favor of plaintiffs for defendants' malicious interference with plaintiff's business. Plaintiffs in this action were owners of a cafe located in Los

Angeles located next to defendants' liquor store. Whenever prospective customers were about to enter plaintiffs' cafe, defendants would harass the customers by making disparaging racial remarks concerning the owners and its employees. Because of defendants' conduct, plaintiff sustained a substantial loss of business.

Although *Guillory* makes no mention of the pecuniary or competitive advantage obtained by defendant, subsequent cases have determined that some pecuniary or economic benefit must accrue. For instance, in *DeVoto v. Pacific Fid. Life Ins. Co.*, 618 F.2d 1340 (9th Cir. 1980), *cert. denied*, 449 U.S. 869 (1980), the court described the relationship of defendant's motive or purpose to a cause of action for tortious intereference with prospective business advantage. Recognizing that interference inspired by ill will or spite may be tortious, the court stated that:

> [i]n all these instances of contractual or business interference, some identifiable benefit accrues to the defendant which formerly belonged to the plaintiff, be it pecuniary or competitive . . . It is the intentional attainment of an unjust advantage which underlies the requirement that the intereference be improper, . . . and motive or purpose is usually an accurate measure of the advantage the actor sought and of its just or unjust character." Id. at 1348.

This requirement of "some identifiable pecuniary or economic benefit" has been reaffirmed in several other federal decisions applying California law. *See Garter-Bare Co. v. Munsingwear Inc.*, 723 F.2d 707,716 (9th Cir. 1984); *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d at 1456.

Plaintiff's second amended complaint is devoid of any allegations of pecuniary or economic benefit. Instead, the second amended complaint alleges that actions of various defendants were taken for the purpose of creating a threat of political and economic sanction that would force Defendant CLA to cancel its contract with Plaintiff" and that such actions were "motivated solely by fear and hatred of Plaintiff's views concerning the Holocaust" and to "prevent Plaintiff from Associating with or expressing his views to CLA members." Therefore, plaintiff's failure to allege that defendants gained any pecuniary or economic benefit from their actions requires plaintiff's second cause of action for intereference

with contract by dismissed with prejudice.

3. Deprivation of Rights

Plaintiff's fourth claim alleges that the City of Los Angeles, Simon Wiesenthal Center, American Jewish Committee and Rabbi Hier deprivated him of "fundamental rights, privileges and immunities" secured to him by the Constitution and the laws of the United States by their action or inaction in pressuring CLA to cancel the contracts. The main defect of this claim is that plaintiff fails to specifically state the Constitutional or statutory basis for the alleged wrong, and therefore plaintiff's conclusory pleading shall be dismissed without prejudice for failure to state a claim. Although defendants liberally construe this claim to arise under 42 U.S.C. §1983, the examination of this claim in the context of a particular statute is premature.

4. Conspiracy to Interfere with Civil Rights

Plaintiff alleges in his fifth claim for conspiracy to interfere with civil rights that defendants City of Los Angeles, Simon Wiesenthal Center, Rabbi Hier, American Jewish Committee, and the Westin Hotels conspired to violate his rights under §1985(3) by engaging in "an escalating series of threats and inducements intended to force defendant CLA to cancel its contracts with plaintiff."

The statutory basis for plaintiff's claim, 42 U.S.C. §1985(3), provides, in relevant part:

> If two or more persons in any state or territory conspire to go into disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the parties so injured or deprived may have an action for recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

In order to state a claim under §1985(3), plaintiff must allege the following: (1) that he is a member of a protected class of persons under the federal equal protection clause; (2) that defendants participated in a conspiracy to deprive him of his rights; (3) that the purpose of the conspiracy was racial or otherwise class-based

invidious discrimination. *See United Brotherhood of Carpenters v. Scott*, 463 U.S. 825 (1983).

In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court determined that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102. Since the facts in *Griffin* involved racial animus against blacks and those who supported them, the facts before the Court involved a situation of invidious racial discriminatory intent which was the Legislature's central concern in enacting §1985(3).

In *Carpenters v. Scott*, a construction company and two of its employees brought suit against a trade council, local unions and certain individuals asserting that the defendants conspired to deprive them of their First Amendment right not to associate with a union. In discussing whether a conspiracy motivated by invidiously discriminatory intent other than racial bias could be actionable under §1985(3), the Supreme Court held that §1985(3) could not be construed to reach conspiracies motivated by bias towards others on account of their economic views, status, or activities. In dicta, the Supreme Court withheld judgment on whether §1985(3) should apply to politically motivated conspiracies since the central concern of the statutory provision was designed to combat "the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Carpenters v. Scott*, 463 U.S. at 837 (Blackmun, J., dissenting).

The Ninth Circuit has extended §1985(3) claims beyond race "only when the class in question can show that there has been a governmental determination that its members 'require and warrant special federal assistance in protecting their civil rights.'" *Schultz v. Sundberg*, 759 F.2d 714,718 (9th Cir. 1985)(transitory coalition of state representatives held not to be a protected class); *see e.g., Trerice v. Pedersen*, 769 F.2d 1398,1402 (9th Cir. 1985)(military prisoners held not to be a protected class). In order to allege a non-racial §1985(3) claim, this circuit requires that the class be designated by the courts as either a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress indicate through legislation that the class requires special protection. *Id.*; *see DeSantis v. Pacific Telephone & Telegraph*

Co., 608 F.2d 327, 333 (9th Cir. 1979); *accord Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 771, 720 (9th Cir. 1981).

In his second amended complaint, plaintiff avers that he is a member of

> a class known as Holocaust revisionists. The members of said class, numbering several thousand in North America and Europe, engage in research, writing, publication and discussion. Their aims and activities in the United States are lawful. Their position with regard to the Holocaust is, in general, that available facts and scientific analysis do not support the popular perception of the Holocaust as a planned extermination of Jews and other persons by the Nazis. ¶ The views of Holocaust revisionist are extremely unpopular in most of Europe and North America. Because of their views, Holocaust revisionists themselves have been subject to invidious discrimination, not only with respect to their efforts to express their views but also in their jobs, businesses, schools and homes.

As presently alleged in the second amended complaint, plaintiff alleges animus based upon unpopular and repugnant views concerning the mass extermination of the Jewish people by the Nazis during World War II. The court finds that plaintiff's allegations, as presently alleged, fail to adequately allege that he is a member of a suspect or quasi-suspect class which is subject to protection under §1985(3). Therefore, the fifth cause of action for conspiracy shall be dismissed with prejudice.

5. Neglect to Prevent Conspiracy

Plaintiff's sixth cause of action is based on 42 U.S.C. §1986 which renders actionable certain failures to prevent conspiracies arising under §1985. Since this circuit adopts the principle that a claim under 42 U.S.C. §1986 cannot stand absent a valid claim for relief under §1985, this claim must also be dismissed with prejudice. See Trerice v. Pedersen, 769 F.2d at 1403.

6. Seventh Claim - Violation of Unruh Civil Rights Act

Plaintiff's seventh claim alleges that the actions allegedly undertaken by defendants American Jewish Committee, Westin Hotels, Rabbi Hier[4] and Simon Wiesenthal Center, were undertaken because of plaintiff's "race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, in violation of Section 51.7 of the California Civil Code," and thus violate the Unruh Civil Rights Act.

California Civil Code §51.7(a) as amended in 1984, provides, in relevant part, as follows:

> All persons within the jurisdiction of this state have the right to be free from any violence or intimidation by threats of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. *The identification in this subdivision of particular basis of discrimination is illustrative rather than restrictive*. (emphasis in original).

In his opposition, plaintiff invokes the protections of this statute on the grounds that defendants' actions were committed because of his "political affiliation or membership in a group subject to invidious discrimination." These conclusory allegations, however, fail to identify the *political* affiliation with which plaintiff is affiliated since the second amended complaint merely states that he is a member of a group of "Holocaust revisionists."

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[4] Rabbi Hier raises a separate defense that his actions were constitutionally protected under the First Amendment guarantee of the right to petition the government for redress of grievances and also invokes the absolute privilege under Cal. Civil Code §47(2) which protects any statement in any legislative proceeding or "in the initiation or course of any other proceeding . . ." This absolute privilege provision is said to apply to City Council members and to those concerned citizens who communicate with their City Council and cannot be defeated by an allegation of malice. *See Scott v. McDonnell Corp.*, 37 Cal. App. 3d 277,288 (1974); *see also, Brody v. Montalbano*, 87 Cal. App. 3d 725 (1978), *cert. denied*, 444 U.S. 844 (1979). In light of the court's findings and conclusions regarding the other defects of the complaint, the court will not address the individual defenses raised herein.

The purpose of the Unruh Civil Rights Act was to provide a remedy for those individuals subject to the denial of civil rights or discrimination because of their race, religion, national origin, or other classes of suspect or quasi-suspect classifications. As presently plead, the complaint fails to identify any political affiliation, or otherwise state that plaintiff is a member of any class subject to protection under the Act. Therefore, the seventh claim shall also be dismissed with prejudice.

7. Request for Sanctions and Attorney's Fees

Defendants Simon Wiesenthal Center and Rabbi Hier request the court to impose sanctions pursuant to F.R.Civ.P. 11 against the plaintiff for the filing of an action that is without legal or factual basis, and in addition, request attorney's fees pursuant to Rule 11 and 42 U.S.C. §1988. Defendants contend that this lawsuit is vexatious, frivolous and that plaintiff filed to this action in order to harass the defendants.

In order to award attorneys fees to moving defendants pursuant to 42 U.S.C. §1988, the court must find that plaintiff's civil rights action is frivolous, unreasonable, or without foundation. *Jensen v. Stangel*, 762 F.2d 815,817 (9th Cir. 1985); *see Sherman v. Babbitt*, 772 F.2d 1476,1478 (9th Cir. 1985). A similar standard is imposed pursuant to Rule 11. At this juncture, the court believes it has insufficient evidence to support such findings, and therefore the court declines to award attorney's fees at this time.

CONCLUSION

Based upon the above discussion, the court summarizes its order as follows:

1) Plaintiff's motion to file a second amended complaint is granted and the second amended complaint is deemed filed;

2) Plaintiff's first, second, fifth, sixth and seventh claims are dismissed with prejudice for failure to state a claim upon which relief can be granted, and;

3) Plaintiff's fourth cause of action is dismissed without prejudice. Plaintiff shall have 20 days from the filing date of this order to file a third amended complaint which cures the deficiencies of the fourth cause of action as set forth in this order. If plaintiff

fails to timely file a third amended complaint, the fourth cause of action shall be deemed dismissed with prejudice. The court, however, cautions plaintiff that the court will apply the standards set forth in 42 U.S.C. §1988 and F.R.Civ.P. 11 in reviewing any amended complaint, and will impose sanctions for the filing of a frivolous pleading.

The only claims remaining in the instant lawsuit are the third and eighth causes of action against the City of Los Angeles.

DATED: FEBRUARY (6), 1987

(signed)
CONSUELO B. MARSHALL, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,
vs.
CALIFORNIA LIBRARY ASSOC., a California Corporation, CITY OF LOS ANGELES, AMERICAN JEWISH COMMITTEE, a New York Corporation, MARVIN HIER, an individual, WESTIN HOTEL CO. OF UAL, INC., a corporation d/b/a WESTIN BONAVENTURE CENTER, Inc., a California corporation, *Defendants*.

No. CV86-4755 CBM

United States District Court, Central District of California
March 24, 1987, Entered

GRANTING MOVING DEFENDANTS' MOTION TO DISMISS.

On February 11, 1987 this court issued a memorandum opinion granting moving defendants' motion to dismiss which dismissed plaintiff's first, second, fifth, sixth and seventh claims for relief with prejudice; dismissed plaintiff's fourth claim without prejudice; and gave plaintiff twenty days from the filing date to amend his fourth cause of action. In the February 11, 1987 order, this court stated that: "If plaintiff fails to timely file a third amended complaint, the fourth cause of action shall be deemed dismissed with prejudice." As of this date, plaintiff has not filed a third amended complaint.

Defendants Rabbi Marvin Hier, Simon Wiesenthal Center and American Jewish Committee now request the court to dismiss the fourth claim with prejudice and to dismiss moving defendants from the lawsuit with prejudice. The court having reviewed the pleadings, hereby issue the following order:

1) Plaintiff's fourth claim for relief is dismissed with prejudice;

2) Plaintiff's entire lawsuit against defendants Rabbi Marvin Hier, Simon Wiesenthal Center, American Jewish Committee, California Library Association, Westin Hotel Co. and Westin Bonaventure Center, Inc. is dismissed with prejudice; and

3) Plaintiff shall respond in writing within 10 days from the filing date of this order why the remaining action against the City of Los Angeles should not be dismissed for lack of prosecution.

MARCH 23, 1987 (signed)
CONSUELO B. MARSHALL, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,

vs.

CALIFORNIA LIBRARY ASSOCIATION, a California corporation, et al., *Defendants*.

No. CV86-4755 CBM (Kx)

United States District Court, Central District of California

March 31, 1987, Entered

STIPULATION AND ORDER FOR DISMISSAL OF CLAIMS WITHOUT PREJUDICE

Plaintiff, DAVID McCALDEN and defendant, CITY OF LOS ANGELES, through their respective counsel, hereby stipulate and agree as follows:

That Plaintiff's Third and Eigth Causes of Action set forth in his Second Amended Complaint be dismissed without prejudice.

This stipulation is submitted pursuant to Rule 41(a), Federal Rules of Civil Procedure.

Dated: (3-11-87)

(signed)
Marcia Haber Camine,
Deputy City Attorney, for
Defendant City of
Los Angeles.

Dated: (3-4-87)

(signed)
Bruce B. Mckee,
Attorney for Plaintiff

IT IS SO ORDERED.

Dated: (26 MAR 87)

(stamped Consuelo B. Marshall)
United States District Judge

APPENDIX E

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,

vs.

CALIFORNIA LIBRARY ASSOCIATION, a California corporation, et al., *Defendants*.

No. CV86-4755 CBM

United States District Court, Central District of California

July 30, 1987, Filed

ORDER DENYING PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT.

Plaintiff David McCalden files the present motion for entry of judgment of the action in order to file an appeal to the Ninth Circuit from this court's order dated February 6, 1987 and March 24, 1987 dismissing certain claims as to certain defendants.[1] Defendants Simon Wiesenthal Center and Rabbi Marvin Hier, joined by defendant California Library Association, file an opposition on the ground the present motion is merely an attempt to revive the lapsed thirty-day limitations period during which plaintiff should have filed a notice of appeal. Defendant City of Los Angeles also files a separate opposition asserting that the motion is an attempt to circumvent the time for filing of a notice of appeal.

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[1] Prior to the filing of the present motion, plaintiff's counsel wrote to this court requesting entry of judgment in a letter dated April 15, 1987. Local Rule 2.10, however, prohibits this form of *ex parte* communication with the court. Local Rule 2.10 provides:

> [a]ttorneys or parties to any action or proceeding shall refrain from writing letters to the judge or otherwise communicating with a judge in a pending matter unless opposing counsel is present. All matters shall be called to a judge's attention by appropriate application or motion filed in compliance with these Local Rules.

Since the letter was in violation of the above Local Rule, the letter was not considered by the court and plaintiff's counsel was informed by the staff that *ex parte* communication of this nature was not permissible.

Initially, the court notes that this action involves a situation where this court dismissed certain claims and certain defendants, and thereafter, plaintiff voluntarily dismissed the remainder of the action. Due to plaintiff's decision to not file a third amended complaint, this case never developed to the point of summary judgment. Nor is this a case where judgment by default was ever requested due to the defendants' responsive pleadings to plaintiff's complaint. Therefore, the case before the court does not involve the usual situation where a judgment is sought by the prevailing party under Rules 55 or 56 of the Federal Rules of Civil Procedure. Instead, the losing party seeks to have a belated entry of judgment in order to appeal from the court's previous dismissals of certain portions of the complaint. Plaintiff has not satisfied the court that there is any authority for this unusual proposition.

This court now turns to when this action became appealable. This court first granted the motions of defendants California Library Association, American Jewish Committee, Westin Hotel Company, Westin Bonaventure Hotel, Simon Wiesenthal Center and Rabbi Marvin Heir in an order dated February 6, 1987.[2] In the order the court found, in part, that the first, second, fifth, sixth and seventh claims failed to state a claim upon which relief could be granted. With respect to these claims, the court determined that plaintiff could not cure the pleading defects and therefore dismissed these claims with prejudice. *See Begsy* 682 F.2d at 1314 ("with prejudice meant no additional amendments would be allowed").

However, the court further found that the fourth amended complaint could be cured, and dismissed the claim *without* prejudice. The court gave plaintiff 20 days from the filing date of the order to file a third amended complaint, and informed plaintiff that the failure to file a timely third amended complaint would result in the dismissal of the fourth cause of action with prejudice.

When plaintiff failed to timely file a third amended complaint, defendants Rabbi Marvin Hier, Simon Wiesenthal Center and American Jewish Committee requested the issuance of an order dismissing plaintiff's entire action as to certain defendants. Plaintiff did not oppose this request, or otherwise seek to have this court

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[2] Since defendant City of Los Angeles did not move to dismiss the complaint, the third and eighth causes of action against the City of Los Angeles were not determined by the order.

certify the issues for appeal pursuant to F.R.Civ.P.54(b).[3] In an order dated March 24, 1987, the court dismissed the fourth claim for relief with prejudice and stated that "[p]laintiff's entire lawsuit against defendants Rabbi Marvin Hier, Simon Wiesenthal Center, American Jewish Committee, California Library Association, Westin Hotel Co. and Westin Bonaventure Center, Inc. is dismissed with prejudice . . ." By this order, the court dismissed with prejudice all of plaintiff's actions against all of the defendants, except for the City of Los Angeles.

Although the above orders dismissing the action with prejudice as to certain claims and certain defendants may not be deemed final without certification pursuant to Rule 54(b), an order of dismissal may be treated as final if the remaining claims have been finalized by subsequent developments. *Anderson v. Allstate*, 630 F.2d 677, 680-81 (9th Cir. 1980)(dismissal of the action as to the remaining defendants rendered the prior order dismissing other defendants as a final appealable order); *see Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981)("judgments whose finality normally would depend upon a Rule 54(b) certificate may be treated as final if remaining claims subsequently have been [sic] finalized, even by developments occurring after appeal"). Here, subsequent to the issuance of the orders of February 6 and March 24 dismissing certain claims and certain defendants, plaintiff voluntarily submitted a stipulation entered into with the remaining defendant, the City of Los Angeles to dismiss the action pursuant to F.R.Civ.P. 41(e). This court signed the stipulation on March 26, 1987. The clerk's office filed the order on March 30, 1987 and entered the order on March 31, 1987. Therefore, after the issuance of this order, there were no remaining claims nor defendants to the action.

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[3] Rule 54(b) of the Federal Rules of Civil Procedure provides that an order adjudicating the rights and liabilities of fewer than all the parties is not final unless the court makes (1) "an express determination that there is no just reason for delay," and (2) "an express direction for the entry of judgment." *Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981). Thus, as here, where there are multiple defendants and an order dismissing the action against only some of the defendants, such order is not final for purposes of 28 U.S.C. §1291 without certification pursuant to Rule 54(b). *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980).

Although plaintiff would not have been able to appeal his own voluntary dismissal of the last defendant, plaintiff could have and should have filed his notice of appeal with respect to the court's orders of February 6 and March 24th shortly after he filed the stipulation dismissing the remaining claims and defendant in this action. However, plaintiff did not take such timely action and now seeks to have this court issue a judgment in order for him to appeal this action.

In sum, even if this court had authority to enter a judgment in the present situation, the court concludes that plaintiff's request is untimely. Accordingly, plaintiff's motion is hereby denied.

DATED: JULY (30), 1987

(signed)
CONSUELO B. MARSHALL, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX F

VIVIANA MCCALDEN,* *Plaintiff-Appellant*, v. CALIFORNIA LIBRARY ASSOCIATION; CITY OF LOS ANGELES; AMERICAN JEWISH COMMITTEE; MARVIN HIER; SIMON WIESENTHAL CENTER, INC.; WESTIN HOTEL CO., dba Westin Bonaventure Hotel, *Defendants-Appellees*.

No. 88-5727

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

May 3, 1989, Argued and Submitted, Pasadena, California
January 24, 1992, Filed

ORDER

The Opinion, filed November 20, 1990, is amended as follows:

(1) By inserting the following footnote on page 14256 of the slip opinion at end of last full sentence before Section IV and renumbering the footnotes:

> [4] It is clear, of course, that none of the appellees can be liable for petitioning the Los Angeles City Council or for organizing a demonstration against McCalden. These activities are plainly protected by the First Amendment. *See Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984); *Brownville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988). Speech or conduct that falls outside the protection of the First Amendment, on the other hand, may expose appellees to liability for interference with contractual relations.

(2) By striking the last paragraph before Section V on page 14260 of the slip opinion.

(3) By inserting the following before Section V on page 14260 of the slip opinion:

Finally, some appellees raise a First Amendment defense to this cause of action, arguing that there can be no liability for alleged threats of violence unless they were "directed to inciting or producing imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *NAACP v. Claiborne Hardware*

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* By this court's order of July 15, 1991, Viviana McCalden was substituted as plaintiff-appellant for David McCalden.

Co., 458 U.S. 886, 927 (1982). We reject this argument. Both *Brandenburg* and *Claiborne* involved public speeches advocating violence, not privately communicated threats of violence as are alleged here. Privately communicated threats have traditionally been punishable where they have "a reasonable tendency to produce in the victim a fear that the threat will be carried out." *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983).

That appellees were engaging in protected expressive activities at the same time and to the same end as the alleged threats of violence does not immunize appellees from liability for the alleged threats. In *Claiborne*, the Court held that NAACP official Charles Evers could not be held liable for a public speech, but the Court stated unequivocally that individuals who "engaged in violence or threats of violence . . . may be held responsible for the injuries that they caused." *Claiborne*, 458 U.S. at 926. Nor does the fact that appellees were politically motivated immunize them from liability if they in fact engaged in threats of violence. The boycotters who threatened and engaged in violence in *Claiborne* were no less politically motivated than Charles Evers whose public speech the Supreme Court held to be protected by the First Amendment. *Id.*; *see also Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987) ("a statement that amounted to a threat to kill the President would not be protected by the First Amendment"). Appellant may not be able to support the allegations in his complaint, but those allegations are sufficient to survive a motion to dismiss.

Judge Fletcher, as dissenter, neither joins in nor opposes the amendment to the majority opinion contained in this order.

With the above amendments, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and a judge in active service requested that a vote be taken on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

Upon the vote of the eligible judges in active service, a majority failed to vote for en banc rehearing. Judge Kleinfeld entered upon active service after the requisite date and was not eligible to vote.

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

KOZINSKI, Circuit Judge, with whom Circuit Judges ALARCON, REINHARDT and T.G. NELSON join, dissenting from the order rejecting the suggestion for rehearing en banc.

This is a case of exceptional importance. What began as a political dispute among widely divergent factions has been converted into a lawsuit; thwarted in the political arena, plaintiff McCalden has chosen to continue the battle by dragging his adversaries into court. The fundamental question presented is how much - or rather how little - he need allege before the courts will entertain his case, putting the defendants to the burden, expense and risk of litigation.

The answer to this question is of profound significance at a time when civil litigation is anything but the "just, speedy, and inexpensive" process contemplated by the Federal Rules of Civil Procedure. The federal courts have recognized that lawsuits impinging on speech presumptively protected by the First Amendment are subject to far more stringent pleading requirements than ordinary lawsuits, precisely because protected speech is so precious -- and so fragile -- that it can easily be smothered under piles of document requests, depositions, interrogatories, requests for admission and the other ordnance in the modern litigator's arsenal.

McCalden alleges repeatedly that the defendants used "threats of violence" to thwart him, and on that basis alone does the panel majority let him proceed with his lawsuit. Nowhere, however, does McCalden give a single example of an actionable threat of violence. McCalden's *only* elaboration on his will-o'-the-wisp allegations is that defendants were "threatening and organizing a *demonstration* which [they] knew and intended would create a reasonable probability of property damages and of violence." Second Amended Complaint ¶ 32 (emphasis added). While genuine threats of violence are not constitutionally protected, I had thought it inconceivable that one could be held liable for planning and organizing a political demonstration. By allowing McCalden to proceed with his lawsuit, my colleagues turn back the clock to the dark days of the not-so-distant past when the judicial process was routinely used to crush opposing viewpoints -- an era I, like most observers, believed had ended with *Brandenburg v Ohio*, 395 US 444 (1969).

Background

McCalden is a Holocaust revisionist. He proselytizes the view that the historical record of Nazis murdering millions of Jews and

other civilians on account of their ethnic and religious affiliations is a hoax. In pursuit of his mission, McCalden contracted for exhibit space at the 1984 meeting of the California Library Association, and also planned to give a presentation there.

McCalden's efforts did not go over well with those who were victims of the Holocaust, or whose families, friends or co-religionists were subjected to Nazi atrocities. Particularly incensed by McCalden's proposed participation in the conference were the American Jewish Committee, the Simon Wiesenthal Center for Holocaust Studies and the Center's director, Rabbi Marvin Hier (collectively Wiesenthal). McCalden alleges that the Wiesenthal defendants[1] took a series of actions designed to keep him from showing his exhibit or holding his presentation. He sued, raising a variety of state and federal claims; the district court dismissed them all. Rejecting defendants' argument that their activities were protected by the First Amendment, the panel majority lets McCalden proceed on his claims for interference with contractual relations and under California's Unruh Civil Rights Act, and remands for a determination whether McCalden has pleaded facts sufficient to support a claim under a federal civil rights statute, 42 USC § 1983.

Discussion

A. Civil litigation is a tool for vindicating important rights, but it can also be a bludgeon for striking at political adversaries. *See Grunwald v San Bernardino City Unified School Dist.*, 917 F2d 1223, 1232-33 (9th Cir 1990) (Kozinski, J., dissenting). The classic example is *New York Times Co. v Sullivan*, 376 US 254 (1964), where the police commissioner of Montgomery, Alabama, sought to use state libel law to crush press support for the nascent civil rights movement in the South. *See generally* Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* ch. 5 (1991).

In case after case since *Sullivan* the Supreme Court and our court have recognized that "the pall of fear and timidity imposed [by the threat of litigation] upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms

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[1] McCalden also sued the Library Association, the City of Los Angeles and the hotel in which the meeting was held; my concern here, however, is only with the Wiesenthal defendants.

cannot survive." *Sullivan*, 376 US at 278; *see Oregon Natural Resources Council v Mohla*, 944 F2d 531, 533 (9th Cir 1991). The uncertainties inherent in our imperfect legal system, coupled with the often staggering out-of-pocket costs of obtaining even a favorable judgment, will necessarily do much to deter expression. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 BU L Rev 685, 687-89, 694-701 (1978).

The federal courts have constructed an important series of safeguards to protect First Amendment speakers from such politically motivated litigation. *Sullivan* established the requirement that public officials plead and prove actual malice in libel cases. 376 US at 279-80. *Bose Corp. v Consumers Union*, 466 US 485, 503-11 (1984), directs the courts of appeals to conduct an independent review of the record. *Hustler Magazine, Inc. v Falwell*, 485 US 46, 55 (1988), proscribes the use of a subjective standard "which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." And *Franchise Realty Interstate Corp. v San Francisco Local Joint Executive Board*, 542 F2d 1076, 1082-83 (9th Cir 1976), establishes that "where a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations [in the complaint] than would otherwise be required."

McCalden's complaint falls far short of the First Amendment's specificity requirement. He alleges nothing -- nothing at all -- that could arguably place defendants' speech outside the protective umbrella of the First Amendment: He does not claim that defendants threatened to break anybody's kneecaps, or to plant a bomb, or to have goons set fire to his exhibit. If plaintiff wants to claim that speech uttered by defendants in pursuit of a political objective is extortion, he must allege facts that, if proven, would amount to extortion.[2] One searches McCalden's 24-page complaint in vain for such allegations.

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[2] Commenting on a closely analogous situation, Professor Tribe notes that "more is needed than a ritual incantation of the word 'incitement' before civil or criminal damages may be assessed on the basis of speech." Laurence H. Tribe, *American Constitutional Law* 849 n.58 (2d ed. 1988).

The panel majority's offhanded treatment of this as an extortion case is perturbing. If these defendants -- operating at the core of the First Amendment -- can be subjected to a lawsuit for extortion based on a handful of conclusory allegations, one wonders and worries who else can so easily be dragged into the quagmire of litigation. The press, for example, is a fat target for suits based on vaguely worded complaints alleging "defamation," "invasion of privacy" or some other speech not sheltered by the First Amendment. *See* Rodney Smolla, *Suing the Press* (1986). I had thought it inconceivable that a complaint by a public figure claiming nothing more than that he was "libeled with malice" would survive a motion to dismiss under Rule 12(b)(6). *See*, for example, *Barger v Playboy Enterprises, Inc.*, 564 F Supp 1151, 1154-57 (ND Cal 1983). Now I'm not so sure; if "threats of violence" is a talisman that can whisk a complaint past a motion to dismiss, why not "libel" and "malice" as well? My colleagues' utter disregard for the First Amendment's specificity requirement will bring a chill of discomfort to publishers, editors and political commentators subject to suit in the Ninth Circuit.

B. But we have here far more than merely the absence of specific allegations of unprotected speech: The speech McCalden does specifically allege is fully protected. McCalden's lengthy complaint makes it clear that he and the Wiesenthal defendants were locked in an intense political struggle, waged through the normal political channels: "The *sole purpose* of [the Wiesenthal defendants'] action was to induce Defendant CLA *by application of political pressure and threats of political sanctions* to cancel its contracts with Plaintiff and to prevent Plaintiff from expressing his views to CLA members." Second Amended Complaint ¶ 37 (emphasis added). After describing how the Wiesenthal defendants used their political clout to get him kicked out of the CLA conference,[3] McCalden gives his first and only hint as to what he is talking about when he alleges threats of violence: "[The Wiesenthal defendants] pressured Defendant CLA to cancel its contracts with Plaintiff *by threatening and organizing a demonstration* which [they] knew and

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[3] Wiesenthal's methods, as described at length in the complaint, included meeting with Library Association officials, seeking the support of the city council, renting a conference room next to McCalden's and disseminating information about McCalden's program to other Jewish organizations. Id ¶¶ 22-39.

intended would create a reasonable probability of property damage and of violence." Id ¶ 32 (emphasis added).

By letting McCalden proceed with a lawsuit that hinges on this allegation, the panel holds that a political organization can be sued for extortion on the basis of statements about a demonstration it intends to conduct at some time in the future. This is astonishing in light of *Brandenburg*, which held that a state may not prohibit "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 US at 447.

Since *Brandenburg*, the Supreme Court has given us more precise guidance in *NAACP v Claiborne Hardware Co.*, 458 US 886 (1982). A local branch of the NAACP and concerned black citizens engaged in a boycott of white-owned stores to protest racial inequality. Charles Evers, one of the NAACP leaders, "stated that boycott violators would be 'disciplined' by their own people and warned that the Sheriff could not sleep with boycott violators at night." Id at 902. Evers was also quoted as saying: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." Id. The Court held that a politically motivated boycott was protected by the First Amendment, even where the boycott organizers made statements that might otherwise sound like threats of violence.

Public demonstrations often carry with them the risk of violence. A large group of individuals, united by a common cause and motivated by strong emotions, can get out of control, causing property damage or injury. This is a risk we endure as part of life in a free society; it is not a sufficient reason -- and I hope it never will become one -- to stifle concerted public expression. If the propensity of large groups of angry people to harm property (and sometimes each other) is sufficient to give the target a cause of action against the organizers of the protest, we will have done much to silence the "vehement, caustic, and sometimes unpleasantly sharp attacks" heretofore protected by the First Amendment. *See Sullivan*, 376 US at 270.

What the Supreme Court recognized in *Claiborne Hardware* and *Brandenburg* is that strongly held political views engage the emotions as well as the intellect, and that the participants will often make statements that -- taken out of context -- sound a lot like

threats of violence. "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." *Claiborne Hardware*, 458 US at 928; see also id at 927 ("mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment") (emphasis in original). As Judge Easterbrook has explained, "[c]ases such as [*Brandenburg*] and [*Claiborne Hardware*] hold that a state may not penalize speech that does not cause immediate injury." *American Booksellers Ass'n, Inc. v Hudnut*, 771 F2d 323, 333 (7th Cir 1985), *affirmed*, 475 US 1001 (1986).[4]

In a belated amendment to its opinion, the panel majority brushes aside *Brandenburg* and *Claiborne Hardware* as cases "involv[ing] public speeches advocating violence, not privately communicated threats of violence as are alleged here." Majority at XXX. My colleagues read these far too parsimoniously. What matters for purposes of the First Amendment is not whether the statements are uttered in public or in private, but whether -- on the basis of what is alleged in the complaint -- the speech in question can fairly be characterized as extortion. *Cf. Watts v United States*, 394 US 705, 707 (1969) (per curiam) (Reversing conviction for hyperbolic statement about shooting President Johnson: "What is a threat must be distinguished from what is constitutionally protected speech.").[5]

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[4] Judge Easterbrook also noted:

> Much speech is dangerous. Chemists whose work might help someone build a bomb, political theorists whose papers might start political movements that lead to riots, speakers whose ideas attract violent protesters, all these and more leave loss in their wake. Unless the remedy is very closely confined, it could be more dangerous to speech than all the libel judgments in history.

Id. at 333. Words my colleagues would do well to heed.

[5] Writing for the Seventh Circuit en banc, Judge Posner interpreted *Brandenburg, Claiborne Hardware, Watts* and other Supreme Court cases to cover situations far more extreme than that here:

> If . . . a new sect of religious fanatics announced that unless Chicagoans renounce their sinful ways it may become necessary to poison the city's water supply, or a newly organized group of white supremacists vowed to take revenge on Chicago for electing a black mayor, these statements, made by groups with no "track record" of violent acts, might well be privileged. Or suppose the leaders of a

Where the lawsuit grows out of a political dispute, *Claiborne Hardware* teaches that we must be extremely chary of letting one side characterize the other side's angry, sometimes menacing, statements as threats of violence actionable under state law. The political context of the statements matters a great deal.

The context here is framed by plaintiff's complaint. Defendants are the American Jewish Committee, the Simon Wiesenthal Center and Rabbi Marvin Hier: two organizations and an individual deeply committed to a political cause -- remembrance of the Holocaust and its horrors -- not back-alley thugs. Their statements were aimed at achieving a political objective, not exacting protection payments. Read in its entirety, not by plucking phrases out of context, McCalden's complaint alleges nothing more than the type of "uninhibited, robust, and wide-open" debate on public issues the First Amendment protects. *See Sullivan*, 376 US at 270.[6] By dismissing *Brandenburg* and *Claiborne Hardware* in a few scant phrases, my colleagues deliver a body blow to the principle that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 US 138, 145 (1983) (quoting *Claiborne Hardware*, 458 US at 913).

> newly formed organization of Puerto Rican separatists went around Chicago making speeches to the effect that, if the United States does not grant Puerto Rico independence soon, it will be necessary to begin terrorist activities on the mainland United States. These speeches could not, in all probability, be made the basis of a prosecution.

Alliance to End Repression v City of Chicago, 742 F2d 1007, 1014 (7th Cir 1984) (en banc) (citations omitted). In light of *Alliance to End Repression* and *Hudnut*, there is little doubt this case would have come out differently had it been brought in the Seventh Circuit.

[6] In achieving their objectives, defendants expressed their angry disagreement with plaintiff's point of view, and let others know they would be there to protest if McCalden were allowed to participate in the Library Association conference. This no doubt put pressure on the Library Association, which had every interest in avoiding a demonstration that would disrupt its proceedings. But threatening to disrupt an event because it features a speaker to whom protestors object is a common tactic, and has never been held to be actionable. *See* Alan M. Dershowitz, *Taking Liberties* 47-49, 166-68 (1988) (discussing hecklers and demonstrators).

Conclusion

No one disputes McCalden's right to say his piece, repugnant though his message be. The federal courts have a long and proud tradition of protecting the right of individuals with unpopular points of view to express themselves publicly even where this subjects onlookers to intense discomfort, even anger. More than a decade ago, for example, neo-Nazis were allowed to march through the streets of Skokie, Illinois, raising a nationwide furor. *See* Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 323-31 (1990). *See also Texas v. Johnson*, 491 US 397 (1989) (flag burning); *Wooley v. Maynard*, 430 US 705 (1977) (covering up patriotic motto on license plate); *Cohen v. California*, 403 US 15 (1971) (profane political slogan). The discomfort and anger such speech generates is often a crucial part of the message, because effective political advocacy seeks to arouse the emotions, not merely the intellect. As the Supreme Court noted in *Johnson*: "'[Free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" 491 US at 408-09 (quoting *Terminiello v. Chicago*, 337 US 1, 4 (1949)). This is all as it should be.[7]

Surely, however, we may not withhold the same privilege of uninhibited, emotionally charged expression from the targets of McCalden's attack. Those who carry the mark of Auschwitz tattooed on their forearms, or who survived Treblinka, Dachau or Buchenwald; who were hunted down like animals in the streets of Warsaw; who saw loved ones perish during Kristallnacht or in frozen boxcars on their way to the death camps that are the shame and horror of modern times -- they cannot be expected to react calmly, with deliberation, with gentility to one who would tarnish the memory of those butchered in the Holocaust by pretending the whole thing never happened. *See* Alan M. Dershowitz, *Chutzpah*

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[7] Indeed, this is all as it *must* be. Were we to allow limitations on speech because it offends community sensibilities, we would eviscerate the anti-majoritarian protections of the First Amendment. See Martin H. Redish and Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 Cal L Rev 267, 297-304 (1991); *see generally*, Lee C. Bollinger, *The Tolerant Society* (1986).

ch. V (1991).[8] Surely *their* anger, *their* disgust, *their* anguish also has a protected place in the wide-open arena of our public discourse. To let plaintiff use a state civil rights statute (and possibly a federal one as well) to punish these defendants for threatening to hold a demonstration voicing their righteous indignation is not only a perversion of those civil rights laws, it is also a devaluation of the precious rights granted all of us by the First Amendment.

Because I believe the court is perpetrating a grave injustice by allowing this unfortunate precedent to be enshrined as the law of the circuit, I respectfully dissent from the refusal to rehear this case en banc.

REINHARDT, Circuit Judge, dissenting from the order rejecting the suggestion for rehearing en banc.

I join in Judge Kozinski's excellent dissent and agree fully with his analysis and comments. I write separately only in order to emphasize four points, and to add a few observations.

First, this appeal involves circumstances and issues that are similar in many respects to those in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Here, as there, a tort suit arises in the context of a bitter political dispute that pits the just against the unjust. Here, as there, the political dispute generates the strongest of emotions among the victims of racial or religious persecution. Here, as there, the objective of the litigation is to penalize those victims for engaging in first amendment conduct. Far more important, however, in both cases the fundamental legal principle involved, and the fundamental lesson to be learned, are the same: Whenever political discourse -- whether in the form of an advertisement in the New

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[8] Professor Dershowitz points out the profound significance of the Holocaust: "The Holocaust changed the nature of Judaism and of Jews forever. It changed the way Jews look at non-Jews, and vice versa. It changed the way every compassionate person views justice and injustice. It should challenge the faith of every thinking being." *Id.* at 130. Wiesenthal's intense -- and not particularly tolerant -- reaction must be understood in light of this reality.

York Times criticizing the treatment of blacks by Southern officials or a communication to the California Library Association (CLA) threatening a forceful and disruptive demonstration because of the participation of Holocaust revisionists in a CLA exhibit -- is the basis for a lawsuit, the courts have a constitutional duty to ensure that the litigation does not become the instrument by which legitimate political speech or activity is stifled.

Second, because the plaintiff seeks to impose liability for speech, his complaint must be subjected to exacting scrutiny. Speech may be chilled not only by an award of damages but also by simply allowing a case to go to trial. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("Fear of large verdicts in damage suits for innocent or merely negligent misstatement, *even fear of the expense involved in their defense*, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.") (quoting *Sullivan*, 376 U.S. at 279) (emphasis added); *cf. American Federation of Labor v. Swing*, 312 U.S. 321, 325 (1941) ("Since the case clearly presents a substantial claim of the right to free discussion and since, as we have frequently indicated, that right is to be guarded with a jealous eye, it would be improper to dispose of the case otherwise than on the face of the decree.") (citations omitted). Speech will inevitably be chilled if vague and conclusory allegations of threats suffice to allow a complaint to survive a motion to dismiss. For this reason, the Constitution imposes more exacting standards at every stage of a lawsuit implicating protected activities.

To survive a motion to dismiss, a complaint that seeks to attach liability to speech must include allegations far more specific than would be necessary in the ordinary civil case. *See Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1082-83 (9th Cir. 1976) (holding that "in any case . . . where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required"), *cert. denied*, 430 U.S. 940 (1977); *accord, Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982). The content, manner, and setting of the offending speech must be pled with specificity in order to allow a court to determine whether the alleged speech is protected under the first amendment. Yet the

majority in *McCalden* never mentions, let alone applies, this heightened standard. In fact, the majority never acknowledges the potential for chilling the defendants' first amendment rights that is inherent in allowing litigation to go forward on the basis of vague complaints alleging tortious speech. The majority's routine treatment of the plaintiff's complaint -- as if the action involved nothing more than a dispute over a bill of lading -- is at odds with the last thirty years of first amendment jurisprudence and is reason enough to hear this case en banc.

Third, the majority has created an artificial and erroneous distinction between public and private speech. The majority does not go so far as to suggest that the intended demonstration itself would have been constitutionally unprotected. Nor does the majority find that, under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982), a public speech or press conference announcing the planned demonstration would be "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," 395 U.S. at 447, and therefore constitutionally unprotected. On the contrary, it appears from the majority opinion that my colleagues recognize that if defendants Rabbi Hier, the Simon Wiesanthal Center, and the American Jewish Committee had notified defendant CLA of their intentions by means of a public communication, the conduct would be protected and dismissal of the complaint would be required. However, the majority concludes that because the defendants[1] allegedly chose to communicate with the CLA in private their otherwise-protected speech is stripped of its constitutional safeguards. This puzzling, and erroneous, conclusion results from the majority's reasoning that "[p]rivately communicated threats have traditionally been punishable where they have 'a reasonable tendency to produce in the victim a fear that the threat will be carried out.'" Amended Majority Opinion at ___ (quoting *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983)). Yet the first

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[1] There are a number of defendants in this case, including the City of Los Angeles and the Westin Bonaventure Hotel. However, for purposes of this dissent, whenever the term "defendants" is used without further identification it refers to the defendants who are alleged to have engaged in the threatening conduct -- Rabbi Hier, the Simon Wiesenthal Center for Holocaust Studies, and the American Jewish Committee.

amendment exception discussed in Wurtz has no applicability whatsoever to the facts of *McCalden*.

It is true that private threats may give rise to criminal or civil liability. So may public threats. The significance of the public-private distinction is that under certain circumstances private threats are more likely to give rise to a reasonable fear that the threat will be carried out. In this case, however, the public-private distinction is without constitutional validity, as well as entirely irrelevant. The principal issue in this case is not whether the recipient of the threat, the California Library Association, had a reasonable fear that the threat would be carried out. The principal issue before us -- the principal issue on which the majority goes astray -- is whether the alleged threat, a threat to hold a public demonstration, is the type on which liability may be founded. Our primary concern must be with the content of that threat, not with whether it was made publicly or privately. If the content of the speech is protected, that is the end of our inquiry. *See generally Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 60 U.S.L.W. 4029, 4034-35 (U.S. Dec. 10, 1991) (Kennedy, J., concurring in the judgment).

Fourth, the first amendment limits the state's power to define words as "threats" and to impose civil liability for their utterance. Under the first amendment, a state may not punish as a threat words that announce an intention to engage in constitutionally protected conduct. In *Wurtz*, the court was considering a threat of rape. Rape, it goes without saying, is quintessential criminal conduct -- hardly a matter for constitutional protection -- and it is not surprising that liability may attach to speech used to instill a fear of such conduct. The "threat" in *McCalden* was to engage in first amendment activity; specifically, to hold a political demonstration. The threat to engage in political activities is protected by the Constitution. The Constitution not only protects the right to hold political demonstrations, it protects the right to tell others of an intention to hold one -- and it protects the right to tell them in private as well as in public. The exception the majority relies on -- an exception used primarily to allow prosecution for extortion -- is for speech that threatens unlawful conduct, speech that threatens the kind of conduct that takes place behind closed doors or in dark alleyways, speech that under the Constitution may be silenced. Such an exception has absolutely no applicability to the case of a threatened

political demonstration.

The threat to conduct a demonstration does not lose its constitutional protection because demonstrations generally, or this demonstration in particular, may be disruptive or likely to result in property damage, and the speaker communicates this fact to the public at large, or to the group at which the demonstration is aimed. Contrary to the *McCalden* majority's view, the lesson of *Brandenburg* and *Claiborne Hardware* is *not* that public speeches are somehow less threatening than private communications and so can be tolerated even when private communications cannot.[2] Whether the defendants informed the CLA of their intention to hold a demonstration by means of a public press conference or a private communication, the CLA would "get the message" just as the boycott violators in *Claiborne Hardware* would have gotten the message whether Charles Evers gave his warning through newspaper ads, at a press conference, or in mailings sent to all the members of local churches or the NAACP. The proper lesson of the Supreme Court cases is that, in the midst of a heated political debate, strong words warning of strong action are normal and healthy, and tolerance of them is necessary if a robust public discourse is to be maintained.

Throughout our history, we have experienced demonstrations that have been disorderly and caused damage. Some of our most important political demonstrations -- the Boston Tea Party, the Cooper Union labor rally, the Ford Motor Company strikes, the Berkeley free speech demonstrations, and the Vietnam War protests -- have been marked by disruptive tactics and even violence. Yet these demonstrations caused the public to confront the underlying

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[2] The majority seems to misunderstand the import of the *Claiborne Hardware* Court's holding that "Charles Evers could not be held liable for [his] public speech, but . . . individuals who 'engaged in violence or threats of violence . . . may be held responsible for the injuries that they caused.'" Amended Opinion at ___ (quoting *Claiborne Hardware*, 458 U.S. at 926). The distinction is not, as the majority asserts, between public and private speech. Instead, it is between a "threat" to conduct a boycott which the Court holds constitutionally-protected even though the sponsor made it clear that violence might well play a part (see note 3), and more specific, individual acts or threats of direct violent conduct which the Court states are unprotected.

political issues and as a result, in many cases, turned the course of our nation's future. The recent unruly political protests directed against California's Governor Wilson in response to his veto of a gay rights bill are simply the latest reminder that political demonstrations are often not quiet, orderly, or anemic. We have come to regret those instances -- such as the Tompkins Square labor demonstration, the I.W.W.'s free speech protests in San Diego and Everett, Washington, the Bonus Expeditionary Force's march on Washington, and the anti-war protests at Kent State -- in which the fear of disorder was used to justify the suppression of free speech. The lesson of our history is that vituperative language and disruptive conduct are frequently normal elements of robust political controversy. We must be wary of direct attempts to suppress that form of political expression through the use of injunctions or criminal proceedings, and we must be equally wary of permitting indirect suppression of such expression by means of tort and other civil actions.

The Supreme Court has held that the first amendment protects speech far more violent and threatening tha[n] anything alleged by the plaintiff here.[3] The Court has reminded us that "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." *Claiborne Hardware*, 458 U.S. at 928. The rules regarding demonstrations are not those of Emily Post, and conduct that would be inappropriate in a parlor is routinely tolerated as a part of a political protest. When a political controversy generates strong emotions and threatens to become unruly, there is

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[3] In *Claiborne Hardware*, the Supreme Court held that Charles Evers' speech was protected even though he "threatened" potential boycott violators by warning them that the sheriff would be unable to protect them from harm if they helped weaken the boycott by failing to live up to their agreement to participate:

> We intend to enforce [the boycott]. You needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none. (That's right.) He ain't going to offer to sleep with none of us men, I can tell you that. (Applause) Let's don't break our little rules that you agreed upon here.

458 U.S. at 938-39. It is worth noting that, though Evers' speech "threatens" boycott violators with harm, the harm threatened is one of the readily foreseeable consequences of a bitter and violently-contested political boycott.

a better solution than silencing the demonstrators -- the government must keep the peace without stifling the debate. *See* Laurence H. Tribe, *American Constitutional Law* § 12-10, at 852 (2d ed. 1988).

To advise the target of a planned political demonstration that the event is likely to result in disruption and property damage is, in many instances, simply to state the obvious. Certain types of constitutionally protected demonstrations involving highly emotional, divisive or inflammatory issues are inevitably going to be less peaceful than might [be] desirable in an ideal society. Demonstrations by Holocaust survivors against Holocaust revisionists clearly fall in this category. Yet, such demonstrations are entitled to full constitutional protection. Certainly, the statement that a political demonstration will be held cannot subject the organizers to liability; nor can the fact that a truthful warning is given that, in view of the nature of its underlying dispute, disruption and property damage may well result.

* * * * *

Viewed in the context of the bitter political controversy which underlies this lawsuit, and evaluated in the light of the four points I have just emphasized, it is apparent that the plaintiff's complaint fails to state a claim. My colleagues admit that even liberally construed, the complaint contains just a single allegation of a specific threat. *See* Amended Opinion at ___ ("Liberally construed, the complaint contains one allegation of a specific threat."). That allegation is that three defendants, Rabbi Hier, the Simon Wiesanthal Center, and the American Jewish Committee, informed defendant CLA that their "Annual Conference would be disrupted, there would be damage to property and the CLA would be 'wiped out.'" *See id.* This specific allegation is supplemented by a more general charge that the disruption and consequent damage would result from "a demonstration that [the three defendants] knew and intended 'would create a reasonable probability of property damage and of violence against Plaintiff and members of Defendant CLA.'" *Id.* (quoting the Plaintiff's complaint). According to the majority, this was sufficient to establish a threat to the plaintiff because "it is reasonable to infer that any property damage or injury threatened could be directed against [the plaintiff], because the allegations clearly link the alleged threat to an intent to disrupt [the plaintiff's] exhibit and program." *Id.* In short, the majority's construction of the complaint is that it alleges that the three defendants told the

CLA that they intended to hold a political demonstration to protest the CLA's choice of conference participants, that this demonstration would cause disruption and property damage, and that some of this damage might be suffered by the plaintiff.

Even under this construction, the complaint does not allege any actions by the defendants that are not protected by the first amendment. When viewed in the context of the overall dispute, the threat to "wipe out" the defendant California Library Association is pure hyperbole and does not rise to the level necessary to sustain the plaintiff's cause of action. *See Cafeteria Employees Union, Local 302 v. Angelos*, 320 U.S. 293, 295 (1943) (holding that state may not hold a union liable for "loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies -- like 'unfair' or 'fascist'"). Similarly, the allegation that the defendants "knew and intended [to] create a reasonable probability . . . of violence" adds nothing. This allegation must be read in light of the more specific allegations that the three defendants threatened to "disrupt" the CLA's meeting and that this would cause a reasonable probability of "damage to property." As used in the complaint, "violence" is a conclusory term. It must be read as referring back to the specific charge that the defendants threatened and intended a disruptive demonstration with the attendant risk of property damage. The term itself adds nothing to those specific charges. There are no allegations of threats of personal violence directed at particular individuals and there is nothing in the complaint to suggest that what was threatened was anything more than what I have previously described as the normal incidents of a highly emotional and volatile political protest. And while such a threat, as explained earlier, may justify the deployment of sufficient law enforcement personnel to maintain the peace, it may not serve as the basis for a complaint for damages. Political demonstrations may not be banned because they are likely to be disruptive or result in property damage; and, even more so, a threat to hold such a demonstration cannot justify the imposition of civil or criminal liability. The interests of society are sufficiently preserved by adequate policing and the punishment of any unprotected conduct that actually occurs.

Moreover, the plaintiff's complaint is far too vague to survive a motion to dismiss. Even the majority's "one allegation of a specific threat" fails to meet the heightened standard of specificity required

by *Franchise Realty*. Although federal appellate courts have had few occasions on which to develop that standard, the California courts have established detailed pleading requirements for complaints alleging tortious speech. Under California law, when a plaintiff seeks damages for another's words, those words "must be specifically identified, if not pleaded verbatim, in the complaint." *Kahn v. Bower*, 284 Cal.Rptr. 244, 252 n.5 (Cal.App. 1991); 5 B. Witkin, California Procedure § 688, at 140 (3d ed. 1985).[4] When the words are ambiguous, what matters is how the recipient of the threat, here the CLA, understood them, and extrinsic circumstances must be pleaded to demonstrate that the words are "fairly susceptible" to an unprotected interpretation and that they were so understood by the recipient. *See* 5 B. Witkin, Summary of California Law § 493, at 580-81 (9th ed. 1988).

The specific allegation at issue in *McCalden* is that the three defendants "contacted a representative of Defendant CLA and informed him that if [its agreements with the plaintiff] were not cancelled, Defendant CLA's 1984 Annual Conference would be disrupted, there would be damage to property and the CLA would be 'wiped out.'" This allegation gives little indication of the actual words alleged to constitute a threat, the manner in which the words were communicated, or *the setting in which the communication took place*. It does not even state whether the words were oral or written (although in this case we may reasonably assume the former). Yet, the merits of a claim based on speech may depend upon the phrasing, manner, and context of the alleged communication. *See, e.g., Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 285-87 (1974) (holding that, when used in the context of a labor dispute, the epithet "scab" may not serve as the basis for a cause of action under state libel law); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13-15 (1970) (same for the use of the

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[4] Although this pleading requirement applies specifically to defamation claims, it is applicable to all claims implicating first amendment activity. As the Supreme Court made clear in *Sullivan*, the limitations of the first amendment are applicable whenever the effect of the litigation is the repression of expression; a cause of action under the Unruh Civil Rights Act -- like any other cause of action -- "can claim no talismanic immunity from constitutional limitations." 376 U.S. at 269; *see also, Blatty v. New York Times Co.*, 232 Cal.Rptr. 542, 549 (Cal. 1986).

term "blackmail" to characterize the negotiating position of one side in a heated political debate). Because the complaint fails to specify these matters, a court could not determine that it states a claim upon which relief may be based, even aside from all its other infirmities. Nor does the plaintiff's allegation that the three defendants "contacted a representative of Defendant CLA and informed him" of the intended demonstration suggest that the setting was in any way threatening -- let alone specify that the "threat" was made in private. Under the pleading requirements applicable in first amendment cases, there is simply no basis for the majority's conclusion that the plaintiff has pled "privately communicated threats of violence" that have "'a reasonable tendency to produce in the victim a fear that the threat will be carried out.'" Amended Opinion at ___ (quoting *Wurtz v. Risley*, 719 F.2d 1348, 1441 (9th Cir. 1983)).

In summary, there are many errors in the majority's opinion in *McCalden*, a number of which would warrant hearing the case en banc. The majority fails to apply the appropriate pleading requirements for complaints seeking to penalize speech. It fails to consider the context of political controversy in which the alleged words were spoken and as a result erroneously extends an exception to the first amendment for criminal threats to speech announcing a political demonstration. It fails to recognize the practical realities of our constitutional commitment to free expression -- that angry rhetoric and the venting of strong emotions are often accompanied by a degree of disruption and even property damage, and that it is far better to tolerate the possibility of such demonstrations than to discourage or prohibit political protest. Nor does the majority appear to recognize that the threat of a demonstration is even further removed from unprotected activity than the act itself -- because the threat of political protest is speech in its purest form. The result of these errors is to subject those engaged in political debate to the possibility of prolonged and expensive court battles and to allow litigants to use the courts to silence political speech rather than protect it. When the defendants threatened to conduct a political demonstration, and thereby purportedly convinced the California Library Association to reject the Holocaust revisionists' participation in its conference, they were simply announcing their intent to exercise their first amendment rights. Allowing McCalden to invoke the power of the courts in order to seek monetary damages does violence to the first amendment protection for free speech. I very

much regret our decision not to hear this case en banc.

* * * * *

Any discussion of the free speech issue in the present case would be incomplete if it failed to take note of the fundamental irony in the parties' respective positions. Here, defendants, the victims of religious persecution and intolerance, sought to shut off the speech of those who would deny the reality of their suffering.[5] In my opinion, this demonstrated exceedingly poor judgment on defendants' part, as well as a myopic view of our democratic system. The episode at Skokie should have taught us all that in the long run it does not pay to try to silence speech we find odious, if only because the result frequently is far more publicity for the point of view we are seeking to suppress.

There are of course more fundamental reasons why we should not stifle offensive speech. "Free speech is life itself." Salman Rushdie (quoted in N.Y. Times, December 12, 1991, at A1); *see also, Sullivan*, 376 U.S. at 725 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'") (quoting John S. Mill, On Liberty 15 (Oxford 1947) (1859)); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing the "marketplace of ideas"). The wisdom of Mill, Holmes, Brennan, and Rushdie should be sufficient to motivate all of us to tolerate speech gladly, even when it appears to be harmful. Simply because we have the constitutional right to attempt to cause businesses, organizations, or institutions to limit speech, to cancel scheduled programs, to withdraw art, to refuse to show motion pictures is no justification for doing so. Democracy suffers when that form of private censorship occurs. Almost everything in our society is offensive to some individual or group. If we permit the silencing of whatever is distasteful to some, our life in this nation will be far less rich and full. New ideas are frequently disturbing -- at least

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[5] Because defendants prevailed below at the pleading stage, we do not know whether they actually uttered the threats they are alleged to have made. There is little doubt, however, that they sought to persuade the CLA that it should not permit the Holocaust revisionists' materials and program to be presented at the annual conference.

until we become used to them. They are not likely to flourish if we chop them off at the inception, simply because some persons or group is offended. The right or wrong of speech is simply irrelevant to the question whether it should be heard. We must have enough confidence in democracy to believe that truth will prevail, or we will soon find ourselves without ideas at all. I would hope that these fundamental principles would guide the defendants', indeed all of our, actions in the future. Nevertheless, unwise as the actions of Rabbi Hier, the Simon Wiesanthal Center, and the American Jewish Committee may have been, because their actions were conducted by protected means, they had a right, under our Constitution, to engage in them -- and they must neither be punished nor sanctioned for doing so.

NOONAN, Circuit Judge, dissenting from the order rejecting the suggestion for rehearing en banc:

While I am in general agreement with the dissents of Judge Reinhardt and Judge Kozinski, it does not seem to me necessary to go beyond the construction of the complaint read in the light of the First Amendment. *Coon v. Joseph*, 192 Cal. App. 3rd 1269, 237 Cal. Rptr. 873 (1987) holds that a threat against another person cannot be construed as a threat against the complainant. No more is alleged here. As the dissents of Judge Reinhardt and Judge Kozinski make clear, an indulgent standard of pleading is inappropriate where the plaintiff is seeking damages for the speech of the defendant. I believe the case should have been taken en banc and dissent from the failure to do so.

APPENDIX G

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,

vs.

CALIFORNIA LIBRARY ASSOCIATION, a California corporation, et al., *Defendants*.

No. CV86-4755 CBM

United States District Court, Central District of California

February 10, 1988, Filed

NOTICE OF APPEAL

Notice is hereby given that DAVID MC CALDEN, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Memorandum Opinion Granting Moving Defendants' Motion to Dismiss entered February 11, 1987; the [Order] Granting Moving Defendants' Motion to Dismiss entered March 24, 1987; and the Order Denying Plaintiff's Motion for Entry of Judgment entered July 30, 1987.

The names of the parties to the orders appealed from are David McCalden, California Library Association, City of Los Angeles, American Jewish Committee, Marvin Hier, Westin Hotel Co. d/b/a Westin Bonaventure Hotel, and Simon Wiesenthal Center, Inc.

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DATED: February 4, 1988

(signed)
Bruce B. McKee, Attorney
for David McCalden

APPENDIX H

DAVID McCALDEN, d/b/a/ Truth Missions, *Plaintiff*,

vs.

CALIFORNIA LIBRARY ASSOCIATION, a California Corporation, CITY OF LOS ANGELES, AMERICAN JEWISH COMMITTEE, a New York corporation, MARVIN HIER, an individual, WESTIN HOTEL CO. OF UAL, INC., a corporation d/b/a WESTIN BONAVENTURE HOTEL, and SIMON WIESENTHAL CENTER, Inc., a California corporation, *Defendants*.

No. CV86-4755 CBM (KX)

United States District Court, Central District of California

February 9, 1987, Filed

SECOND AMENDED COMPLAINT FOR BREACH OF CONTRACT; FOR INTENTIONAL INTERFERENCE WITH CONTRACT; FOR VIOLATION OF CONSTITUTION; FOR DEPRIVATION OF CIVIL RIGHTS; FOR CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS; FOR NEGLECT TO PREVENT CONSPIRACY; FOR VIOLATION OF UNRUH CIVIL RIGHTS ACT; AND FOR INJUNCTION.

Plaintiff alleges:

JURISDICTION AND PARTIES

1. This action is brought pursuant to 42 U.S.C. Section 1981, 1983, 1985, 1986 and 1988, and the First, Fifth, and Fourteenth Amendments. Jurisdiction is founded on 28 U.S.C. Sections 1331, 1332 and 1343 (1) (2) (3) (4), and the aforementioned statutory and Constitutional provisions. Plaintiff further invokes the pendant jurisdiction of this Court to consider claims arising under State law.

2. The amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000).

3. Plaintiff, DAVID McCALDEN, is and was at all times relevant hereto a citizen of the United Kingdom and a legal permanent resident of the United States. As to all matters alleged herein, plaintiff was doing business under the name "Truth

Missions".

4. Plaintiff is informed and believes and thereon alleges that Defendant CALIFORNIA LIBRARY ASSOCIATION is and was at all times relevant hereto a corporation organized and existing under the laws of the State of California.

5. Plaintiff is informed and believes and thereon alleges that Defendant AMERICAN JEWISH COMMITTEE is and was at all times relevant hereto a corporation organized under the laws of the State of New York.

6. Plaintiff is informed and believes and thereon alleges that Defendant CITY OF LOS ANGELES is and was at all times relevant hereto a municipal corporation, organized and existing under the laws of the State of California.

7. Defendant CITY OF LOS ANGELES has ratified all of the acts and omission herein below recited.

8. Plaintiff is informed and believes and thereon alleges that Defendant MARVIN HIER is an individual resident in the County of Los Angeles, California, and is affiliated with and employed by Defendant SIMON WIESENTHAL CENTER, INC., as dean, i.e. executive director.

9. Plaintiff is informed and believes and thereon alleges that Defendant WESTIN HOTEL CO. OF UAL, INC. ("WESTIN") is and was at all times relevant hereto a corporation doing business in California as Westin Bonaventure Hotel.

10. Plaintiff is informed and believes and thereon alleges that Defendant SIMON WIESENTHAL CENTER, INC. a/k/a Simon Wiesenthal Center for Holocaust Studies a/k/a/ Simon Wiesenthal Center is a corporation organized under the laws of the State of California and is the successor in interest, owner, principal and responsible entity for predecessor organizations of the same name, some or all of which participated in the transactions and activities herein alleged.

COMPLIANCE WITH CALIFORNIA GOVERNMENTAL TORT CLAIMS ACT

11. With respect to the acts and omissions herein alleged, on May 25, 1985, Plaintiff filed, pursuant to California Government

Code Section 911.4, an Application for Permission to File a Late Claim and a claim form with Defendant, CITY OF LOS ANGELES.

12. On August, 16, 1985, Plaintiff was notified by Defendant CITY OF LOS ANGELES that his claim was denied.

FIRST CAUSE OF ACTION
(Breach of Contract)

13. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 12 of this Complaint.

14. On or about July 19, 1984, Plaintiff entered into a written contract with Defendant CALIFORNIA LIBRARY ASSOCIATION (hereinafter "CLA") for the rental of exhibit space at the CLA's 86th Annual Conference scheduled for December 1 through 5, 1984, at the Westin Bonaventure Hotel in Los Angeles. Copies of the documents constituting said contract are attached hereto as Exhibit A and incorporated herein by reference. Said contract shall hereinafter be referred to as "Contract A." The description of Plaintiff's proposed exhibit, as set forth in Contract A, is "Publishers of revisionist, libertarian and atheist research. Specializing in the defense of civil liberties for unpopular causes."

15. On or about August 17, 1984, Plaintiff entered into an additional written contract with Defendant CLA for the presentation of a program at the above-mentioned Annual Conference. Said program was scheduled for the evening of December 2, 1984. Copies of the documents constituting said contract are attached hereto as Exhibit B and incorporated herein by reference. Said contract shall hereinafter be referred to as "Contract B." The description of the proposed program, as set forth in Contract B, is "Free Speech and the Holocaust" -- "An overview from several speakers of the severe censorship and intellectual terrorism which inhibits any objective, open discussion of this controversial subject." The contract indicated that 8 speakers would participate in the program, including Plaintiff; Bradley Smith, Director, Sacred Cow Press; Dr. Peter H. Peel, Santa Monica Community College; Dr. George Ashley, Polytechnic High School; and Jefferson P. Selth, Librarian, University of California, Riverside.

16. On or about November 16 or 17, 1984, Defendant CLA, acting unfairly and in bad faith, breached Contract A and Contract

B by cancelling Plaintiff's previously approved exhibit and program. In its notice of cancellation, a copy of which is attached hereto as Exhibit C, the CLA indicated that it "had received threats of substantial disruption to the conference and to the property of other exhibitors should your [Plaintiff's] program be allowed to be presented." However, the real and only substantial reason for defendant CLA's decision to cancel its contracts with plaintiff was its concern about loss of support, including financial support, as a result of action taken by defendant CITY OF LOS ANGELES on or about November 16, 1984, in the form of a resolution of the Los Angeles City Council, a copy of which is attached hereto as Exhibit D and incorporated herein by reference.

17. Defendant CLA's breach of Contract A and B was intentional and without justification or excuse.

18. Plaintiff had performed all parts of Contract A and of Contract B which he was required to perform.

19. In both Contract A and Contract B there was present a public interest consideration of constitutionally protected rights.

20. As a result of Defendant CLA's breach of Contract A and Contract B, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, in a sum not less than $10,000.

WHEREFORE, Plaintiff prays for relief as set forth below.

SECOND CAUSE OF ACTION
(Interference with Contract)

21. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15 of this Complaint.

22. After Plaintiff had entered into Contract A and Contract B with Defendant CLA, and prior to December 1, 1984, Defendant AMERICAN JEWISH COMMITTEE ("AJC") requested a meeting with representatives of Defendant CLA with the purpose and intent of pressuring Defendant CLA to cancel its contract with Plaintiff. Representatives of Defendant CLA agreed to attend and did attend such a meeting prior to December 1, 1984, at Defendant AJC's offices in Los Angeles.

23. As a direct and proximate result of persuasion, threats, misrepresentations and other tortious conduct of Defendant AJC at said meeting, Defendant CLA determined to and did cancel its contracts with Plaintiff.

24. Plaintiff is informed and believes and on that basis alleges that after Plaintiff had entered in Contract A and Contract B with Defendant CLA, and prior to December 1, 1984, representatives of Defendant AJC, at the urging and request and with the knowledge, approval and cooperation of Defendant MARVIN HIER ("HIER") and SIMON WIESENTHAL CENTER, INC. ("WIESENTHAL"), contacted a representative of Defendant CLA and informed him that if the aforesaid Contract A and Contract B were not cancelled, Defendant CLA's 1984 Annual Conference would be disrupted, there would be damage to property and the CLA would be "wiped out." The aforesaid conduct of Defendant AJC, as set forth in this paragraph and in paragraphs 22 and 23, was intentional, malicious, fraudulent and in conscious disregard of the contractual and constitutional rights of Plaintiff.

25. As a direct and proximate result of such threats, Defendant CLA determined to and did cancel its contracts with Plaintiff.

26. After Plaintiff had entered into Contract A and Contract B with Defendant CLA, and prior to December 1, 1984, Defendant CITY OF LOS ANGELES acting through its City Council, officially requested that Defendant CLA remove Plaintiff from its programs, and officially severed City participation in Defendant CLA in protest of the CLA's having contracted with Plaintiff, and for the purpose of creating a threat of political and economic sanctions that would force Defendant CLA to cancel its contracts with Plaintiff. Such action was taken by Defendant CITY OF LOS ANGELES, by unanimous Resolution of its City Council, based upon representations of Councilman Yaroslavsky. Said representations misidentified Plaintiff, misrepresented Plaintiff's position and stated purpose of his program, and was motivated solely by fear and hatred of Plaintiff's views concerning the Holocaust. A copy of a transcript of City Council proceedings concerning plaintiff is attached hereto as Exhibit E and incorporated herein by reference. Said transcript was prepared from an official audio tape of Council Proceedings.

27. Plaintiff is informed and believes and on that basis alleges

that the aforesaid Resolution was introduced by Councilman Yaroslavsky at the specific instance and request of one of his constituents, Defendant HIER, and that Defendant HIER misrepresented to Councilman Yaroslavsky the nature and purpose of Plaintiff's intended program at the CLA annual conference, the identity of Plaintiff, the affiliations of Plaintiff, and the identities, affiliations and beliefs of persons scheduled to appear with Plaintiff at said annual conference. Plaintiff is informed and believes and on that basis alleges that said conduct of Defendant HIER was in an individual capacity and/or as dean of Defendant WIESENTHAL, and that said conduct was undertaken at the request and urging, and with the knowledge, approval, and cooperation of Defendants WIESENTHAL and AJC, of Los Angeles Mayor Tom Bradley and others.

28. Said Council Resolution and other matters of a condemnatory nature were communicated by Defendant CITY OF LOS ANGELES to Defendant CLA, prior to December 1, 1984, with the result that Defendant CLA determined to and did cancel its contracts with Plaintiff. The aforesaid conduct of Defendants CITY OF LOS ANGELES, HIER, WIESENTHAL AND AJC was intentional, malicious, fraudulent, and in conscious disregard of the contractual and constitutional rights of Plaintiff.

29. Plaintiff is informed and believes and on that basis alleges that after Plaintiff had entered into Contract A and Contract B with Defendant CLA, and prior to December 1, 1984, Defendant WIESENTHAL, at the direction of defendant HIER, and at the request and urging and with the knowledge, approval and cooperation of Defendant AJC rented a conference room from Defendant WESTIN at the Westin Bonaventure Hotel for the evening of December 2, 1985, i.e., the evening on which Plaintiff's program "Free Speech and the Holocaust" was scheduled to take place. Said conference room was immediately adjacent to the room in which Plaintiff's program was scheduled to take place, and was within the area of the hotel which had previously been "block booked" to Defendant CLA for its 1984 annual conference.

30. Plaintiff is informed and believes and thereon alleges that the principal, if not sole purpose of Defendant WIESENTHAL's renting said conference room was to position itself and Defendants HIER and AJC so as to be able to disrupt Plaintiff's program should it take place. The aforesaid conduct of Defendant WIESENTHAL was intentional, malicious, fraudulent and in conscious disregard of

the contractual and constitutional rights of Plaintiff.

31. Plaintiff is informed and believes and thereon alleges that Defendant WESTIN knew or should have known at the time it entered into said rental agreement with Defendant WIESENTHAL that to do so constituted a breach of its agreement with Defendant CLA to provide adequate security, including limited public access, to the CLA conference area. Plaintiff is informed and believes and thereon alleges that Defendant CLA had conferred with Defendant WESTIN on several occasions and at length concerning security arrangements for said annual conference and that Defendant WESTIN, its agents and employees, were fully apprised that one of the principal security concerns of Defendant CLA was to maintain order at Plaintiff's program on the evening of December 2, 1984. The aforesaid conduct of Defendant WESTIN was intentional, malicious and in conscious disregard of Plaintiff's contractual rights, including rights as beneficiary of any contract between Defendants CLA and WESTIN, and was a proximate cause of Defendant CLA's breach of its contracts with Plaintiff.

32. Plaintiff is informed and believes and on that basis alleges that after Plaintiff had entered into Contract A and Contract B, and prior to December 1, 1984, defendant HIER, acting individually and/or as dean of Defendant WIESENTHAL, and at the request and urging and with knowledge, approval and cooperation of Defendants WIESENTHAL and AJC, and others, pressured Defendant CLA to cancel its contracts with Plaintiff by threatening and organizing a demonstration which he knew and intended would create a reasonable probability of property damage and of violence against Plaintiff and members of Defendant CLA; and by then offering to remove said threat if Defendant CLA cancelled Contract B and publicly dissociated itself from Plaintiff.

33. Plaintiff is informed and believes and thereon alleges that the principal, if not sole purpose of Defendant HIER's action was to induce Defendant CLA by threats of violence and disruption to cancel its contracts with Plaintiff and to prevent Plaintiff from expressing his views to members of Defendant CLA, and further that as a direct and proximate result of such conduct Defendant CLA determined to and did cancel its contracts with Plaintiff.

34. Plaintiff is informed and believes and on that basis alleges that Defendants HIER and/or WIESENTHAL and/or AJC intentionally allowed information concerning Plaintiff's exhibits and

program to pass to members of certain militant, violence prone Jewish organizations who thereupon made plans to attend and disrupt Plaintiff's program and to disrupt Defendant CLA's conference through demonstrations organized by Defendant HIER. Information concerning plans of such organizations was given to Defendant CLA by representatives of the Los Angeles Police Department.

35. Plaintiff is informed and believes and on that basis alleges that the principal, if not sole purpose of Defendant HIER's and/or WIESENTHAL's and/or AJC's action was to induce Defendant CLA by further threats of violence and disruption to cancel its contracts with Plaintiff and to prevent Plaintiff from expressing his views to members of Defendant CLA, and further that as a direct and proximate result of such conduct Defendant CLA determined to and did cancel its contracts with Plaintiff.

36. Plaintiff is informed and believes and on that basis alleges that Defendants HIER and/or WIESENTHAL and/or AJC sought and obtained the cooperation of public officials, including without limitation, Mayor Tom Bradley, Assembly Speaker Willie Brown, State Senate President Davis Roberti, and Assembly Majority Floor Leader Mike Roos, as part of a conspiracy to pressure Defendant CLA to cancel its contracts with Plaintiff; and that in furtherance of such conspiracy each of said public officials contacted Defendant CLA, either verbally or in writing, for the sole and express purpose of inducing Defendant CLA to cancel said contracts and to prevent Plaintiff from expressing his views to CLA members. And further with respect to such conspiracy, Mayor Tom Bradley instructed members of the Los Angeles Library Commission to boycott Defendant CLA's Annual Conference, as an additional means of pressuring Defendant CLA to cancel its contracts with Plaintiff.

37. Plaintiff is informed and believes and on that basis alleges that the sole purpose of Defendant HIER's and/or WIESENTHAL's and/or AJC's action was to induce Defendant CLA by application of political pressure and threats of political sanctions to cancel its contracts with Plaintiff and to prevent Plaintiff from expressing his views to CLA members, and further, that as a direct and proximate result of such conduct Defendant CLA determined to and did cancel its contracts with Plaintiff.

38. Plaintiff is informed and believes and on that basis alleges

that the conduct of Defendants HIER, WIESENTHAL, AJC, WESTIN and CITY OF LOS ANGELES, as alleged in paragraphs 24 through 37, was part of a deliberate and concerted effort to organize and effect a campaign of escalating high pressure tactics, involving threats of violence and disruption and of political and economic sanctions, solely for the purpose of forcing Defendant CLA to cancel its contracts with Plaintiff and to prevent Plaintiff from associating with or expressing his views to CLA members.

39. Plaintiff is informed and believes and on that basis alleges that Defendant CITY OF LOS ANGELES, through its Mayor, Police Department, City Council and others, knew and either tacitly approved or failed to prevent or deter the conduct of Defendants WIESENTHAL and/or HIER and/or AJC alleged in paragraphs 22 through 24, and 27 through 38 of this Complaint.

40. As a direct and proximate result of conduct of Defendants AJC, CITY OF LOS ANGELES, HIER, WESTIN and WIESENTHAL, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, in a sum not less than $10,000.

WHEREFORE, Plaintiff prays for relief as set forth below.

THIRD CAUSE OF ACTION
(Violation of U.S. Constitution)

41. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15 and 26 through 28 of this Complaint.

42. The above-mentioned Resolution of the City Council of the City of Los Angeles, passed on November 16, 1984 (Exhibit D), is in violation of the United States Constitution in that it was intended to and did, through public condemnation and pressure of Defendant CLA, interfere impermissibly with Plaintiff's rights of free speech and assembly and his right to due process of law.

43. Plaintiff is informed and believes and thereon alleges that the only rationale for such official action of Defendant CITY OF LOS ANGELES was that Plaintiff's views are generally thought to be repugnant, hateful and untruthful. Plaintiff was not given notice that his views and his contracts with Defendant CLA were to be on the City Council's agenda, nor was Plaintiff present at said Council

meeting, nor was Plaintiff given any opportunity to defend himself or to explain that his program at said CLA convention was to concern "Free speech and the Holocaust." Moreover, said Council made no effort to verify the allegations against Plaintiff which it felt would justify its official actions. See Exhibit E attached hereto and incorporated herein by reference.

44. As a direct and proximate result of unconstitutional action of Defendant CITY OF LOS ANGELES, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, in a sum not less than $10,000.

WHEREFORE, Plaintiff prays for relief as set forth below.

FOURTH CAUSE OF ACTION
(For Deprivation of Rights)

45. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15, and 26 through 39, and 42 and 43 of this Complaint.

46. In addition to depriving Plaintiff of fundamental rights, privileges and immunities by official action, as herein alleged, Defendant CITY OF LOS ANGELES, through intentional inaction, further deprived Plaintiff of such rights, privileges and immunities. Both the action and inaction of Defendant CITY OF LOS ANGELES, and the action of Defendants HIER, WIESENTHAL and AJC more particularly described in paragraphs 26 through 36, and 39 and 40, and in the following paragraphs, are the subject of this cause of action.

47. Plaintiff is informed and believes and thereon alleges that prior to December 1, 1984, agents and employees of Defendant CITY OF LOS ANGELES, and particularly of its Police Department, acting under color of law, approached the Director of Defendant CLA and informed him that they had received death threats directed against him if he allowed the CLA to honor its contract with Plaintiff and allowed Plaintiff to speak at the CLA's annual convention He was further informed that these threats were "real." Said agents and employees further informed the Director of Defendant CLA that there would be violent demonstrations against

him and against the CLA if he allowed the CLA to honor its contract with Plaintiff and allowed Plaintiff to speak at the CLA's annual convention. Said agents and employees further informed Defendant CLA that the Police Department of Defendant CITY OF LOS ANGELES would henceforth be unable to provide adequate police protection or security measures for the CLA's annual convention, for the CLA itself, for the Director of the CLA, and for Plaintiff.

48. The above-mentioned actions of Defendants CITY OF LOS ANGELES, HIER, WIESENTHAL and AJC were unreasonable and unjustified and were motivated by a desire and intent to deprive Plaintiff of rights, privileges and immunities secured to him by the Constitution and laws of the United States. Said actions did, in fact, subject or cause Plaintiff to be subjected to the deprivation of rights, privileges and immunities secured to him by the Constitution and laws of the United States.

49. In committing the acts alleged above, Defendants HIER, WIESENTHAL, AJC and CITY OF LOS ANGELES acted deliberately and intentionally, under color of law, custom and usage, with malice, and with the intent to harm, intimidate and injure Plaintiff.

50. Plaintiff is informed and believes, and thereon alleges, that Defendant CITY OF LOS ANGELES has ratified the above mentioned acts committed by its agents and employees by continuing to employ said persons and by failing to take any measures to discipline, reprimand, punish, or deter said persons from further such conduct.

51. As a direct and proximate result of such conduct of Defendants CITY OF LOS ANGELES, HIER, WIESENTHAL and AJC Plaintiff has suffered damages including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, in a sum not less than $10,000.

WHEREFORE, Plaintiff prays for relief as set forth below.

FIFTH CAUSE OF ACTION
(Conspiracy to Interfere with Civil Rights)

52. Plaintiff incorporates by this reference the allegations of

paragraphs 1 through 15, 26 through 39, 42, 43, and 46 through 50 of this Complaint.

53. The above-described conduct of Defendants AJC, CITY OF LOS ANGELES, HIER, WESTIN and WIESENTHAL, and each of them, was undertaken in furtherance of a conspiracy or conspiracies to deprive Plaintiff, directly and indirectly, of the equal protection of the laws and of equal privileges and immunities under the laws, and for the purpose of preventing and hindering the constituted authorities of this state from giving an securing to all persons within this state the equal protection of the laws. Said defendants and others joined in such conspiracy or conspiracies as part of a wide ranging and concerted effort to deprive Plaintiff of his constitutional rights, privileges and immunities. Said defendants and others engaged in an escalating series of threats and inducements intended to force Defendant CLA to cancel its contracts with Plaintiff. Conduct undertaken in furtherance of such conspiracy or conspiracies includes without limitation: obtaining a resolution of the Los Angeles City Council condemning Plaintiff without notice or hearing and threatening severe economic and political sanctions against Defendant CLA if it allowed Plaintiff to express his views at its Annual Conference; threatening and organizing protests which were calculated to create a threat of property damage and violence against Plaintiff and CLA members; renting a conference room adjacent to Plaintiff's in order to gain access to and disrupt Plaintiff's program and prevent Plaintiff from expressing his views; withdrawing Los Angeles Police security from Defendant CLA's Annual Conference; and inducing public figures such as Assembly Speaker Willie Brown and Los Angeles Mayor Tom Bradley to exert political pressure against Defendant CLA to prevent Plaintiff from expressing his views.

54. Said conspiracy or conspiracies were directed against Plaintiff not as an individual but solely because of his membership in a class know as Holocaust revisionists. The members of said class, number several thousand in North America and Europe, engage in research, writing, publication and discussion. Their aims and activities in the United States are lawful. Their position with regard to the Holocaust is, in general, that available facts and scientific analysis do not support the popular perception of the Holocaust as a planned extermination of Jews and other persons by the Nazis.

55. The views of Holocaust revisionists are extremely unpopular in most of Europe and North America. Because of their views, Holocaust revisionists themselves have been subject to invidious discrimination, not only with respect to their efforts to express their views but also in their jobs, businesses, schools and homes. Incidents of such discrimination include, without limitation, summary termination of employment for holding or expressing revisionist views; physical attacks against known revisionists; firebombings of the home of a revisionist and the offices of a revisionist publisher; obscene phone calls; threats, intimidation and harassment of revisionists. All of such discrimination is class based and is intended to suppress the free exercise of legal rights in the same circumstances, i.e., circumstances similar to those of victims of Ku Klux Klan violence, which led to the passage of our nation's first civil rights laws, and specifically of 42 U.S.C. §1985(3).

56. Plaintiff and other Holocaust revisionists are deserving of the protection of 42 U.S.C. §1985(3) because local governmental agencies, including law enforcement authorities, have participated in conspiracies to deprive such persons of their rights and/or have refused to protect such persons in the free exercise of their rights. In this action, for example, the conduct of Defendant CITY OF LOS ANGELES was motivated by hatred and fear of the views of Plaintiff and other Holocaust revisionists, as more specifically set forth in the transcript of City Council proceedings attached hereto as Exhibit E.

57. As a direct and proximate result of said conspiracy or conspiracies, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, and has been deprived of having and exercising the rights and privileges of a legal permanent resident of the United States.

WHEREFORE, Plaintiff prays for relief as set forth below.

SIXTH CAUSE OF ACTION
(Neglect to Prevent Conspiracy)

58. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15, 26 through 39, 42, 43, 46 through 50, and 53 through 57 of this Complaint.

59. Defendants AJC, CITY OF LOS ANGELES, HIER, WESTIN, and WIESENTHAL, and each of them, knew or should have known that the necessary object and intended effect of the wrongful conduct, conspiracies, and concerted action described herein was to deprive Plaintiff of legal rights, privileges, and immunities and of the equal protection of the laws.

60. Defendants AJC, CITY OF LOS ANGELES, HIER, WESTIN and WIESENTHAL, and each of them, had the power to prevent or aid in preventing the commission of said wrongs, but nevertheless neglected and refused to do so. Each of said Defendants, by reasonable diligence, could have prevented the occurrence of all or some of the wrongs suffered by Plaintiff as a result of illegal conspiracies alleged herein.

61. As a direct and proximate result of said neglect and refusal to prevent acts in furtherance of conspiracies herein alleged, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, and loss of publicity and recognition in the practice of his profession, and has been deprived of having and exercising the rights and privileges of a legal permanent resident of the United States.

WHEREFORE, Plaintiff prays for relief as set forth below.

SEVENTH CAUSE OF ACTION
(Violation of Unruh Civil Rights Act)

62. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15, 24, 29 through 39, 46 through 50, and 53 through 55 of this Complaint.

63. The above-described threats of violence and intimidation by threats of violence committed against Plaintiff's person and property by Defendants AJC, WESTIN, HIER and WIESENTHAL, and each of them, were undertaken because of Plaintiff's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, in violation of Section 51.7 of the California Civil Code.

64. Defendants AJC, WESTIN, HIER and WIESENTHAL, and each of them, and their agents, members, and employees, aided, incited and conspired to deny to Plaintiff his right to be free from such threats and intimidation, by means of the conduct herein

alleged and other conduct not presently known to Plaintiff.

65. As a direct and proximate result of conduct of Defendants AJC, WESTIN, HIER and WIESENTHAL, and each of them, Plaintiff has suffered damages, including without limitation, loss of business, loss of good will, loss of professional reputation, loss of publicity and recognition in the practice of his profession.

WHEREFORE, Plaintiff prays for relief as set forth below.

EIGHTH CAUSE OF ACTION
(For Injunction)

66. Plaintiff incorporates by this reference the allegations of paragraphs 1 through 15, 26 through 39, 42, 43, 46 through 50, 53 through 56, and 59 through 61 of this Complaint.

67. The above-mentioned conduct of Defendant CITY OF LOS ANGELES is tortious, unconstitutional and constitutes a deprivation of Plaintiff's civil rights, a conspiracy to deprive Plaintiff of his civil rights, and neglect and refusal to prevent such conspiracy.

68. Unless Defendant CITY OF LOS ANGELES is enjoined from further such conduct, Plaintiff will remain subject to condemnation by said Defendant without noitice or hearing and to threats and pressure by said Defendent against Plaintiff and persons with whom he associates or wishes to associate. Such conduct by Defendant CITY OF LOS ANGELES will lead to irreparable injury to Plaintiff's reputation and ability to earn a living. Moreover, such conduct, if not enjoined, may endanger Plaintiff's personal safety since it gives to third persons the impression that Plaintiff will not be protected by civil authorities.

WHEREFORE, Plaintiff prays for relief as follows:

1. For general damages according to proof at trial;

2. For punitive damages;

3. For costs of suit;

4. For a reasonable attorney's fee;

5. For injunctive relief against Defendant CITY OF LOS ANGELES prohibiting it from taking official action against Plaintiff or those associated with Plaintiff without notice of intended action and opportunity for Plaintiff to be heard; and

6. For such additional relief as the court deems appropriate in the circumstances.

DATED: August 28, 1986

(signed)
BRUCE B. McKEE

Supreme Court, U.S.
FILE
MAY 6 1992
OFFICE OF THE CLERK

No. 91-1643

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THE SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES, RABBI MARVIN HIER, THE AMERICAN JEWISH COMMITTEE and THE CITY OF LOS ANGELES,
Petitioners,
VS.
VIVIANA McCALDEN, as Administrator of the Estate of David McCalden,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

REASONS FOR DENYING THE WRIT 5

I

PETITIONERS' CONDUCT IS NOT PRIMA FACIE PROTECTED BY THE FIRST AMENDMENT 6

II

THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING HEIGHTENED PLEADING STANDARDS 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

	Page
Brandenberg v. Ohio, 395 U.S. 444 (1969)	7
Estelle v. Gamble, 429, U.S. 97 (1976)	9
Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd., 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977)	7-8
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)	7
NLRB v. Hendricks County Rural Electric Corp., 454 U.S. 170 (1981)	5
United States v. Johnston, 268 U.S. 220 (1925)	5
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)	2
Wisniewski v. United States, 353 U.S. 901 (1957)	8

Constitutional Provision, Statutes and Rules

U.S. Constitution, First Amendment	*passim*
42 U.S.C. Section 1983	1-2
Section 1985(3)	2
Section 1986	2
Unruh Civil Rights Act, Cal.Civ.C. Section 57.1	1
F.R.Civ.P. 12(b)(6)	1, 6, 7
Supreme Court Rule 10	6

STATEMENT OF THE CASE

David McCalden's[1] claims arose as a result of a conspiracy which led to concerted action, in the form of escalating pressure tactics, including threats and intimidation, taken by petitioners Simon Wiesenthal Center for Holocaust Studies ("SWC"), Rabbi Marvin Hier ("Hier"), The American Jewish Committee ("AJC") and the City of Los Angeles ("City") in order to coerce the California Library Association ("CLA") to cancel McCalden's contracts for presentation of an exhibit and program at the CLA's 86th Annual Conference. McCalden was a Holocaust revisionist; however, the purpose of his exhibit and program was not to discuss the Holocaust, but to display censored publications and to discuss efforts to supress the speech of Holocaust revisionists. Acts taken in furtherance of the conspiracy include: direct communication of threats of violence, disruption and property damage; specific actions designed to increase the likelihood that these things would happen; intimidation by refusal to provide police protection after police confirmation that threats of violence were serious; and the imposition of political and economic sanctions. The conspirators' actions were motivated by a class-based, invidiously discriminatory animus against McCalden because he was a Holocaust revisionist. The conspirators acted solely for the purpose of preventing McCalden from associating with or expressing his views about free speech and the Holocaust to CLA members.

Petitioners seek review of an interlocutory decision of the Court of Appeals. (A15)[2] Ruling on F.R.Civ.P. 12(b)(6) motions, the Court of Appeals held that McCalden had stated claims for breach of contract, for interference with contract and for violation of California's Unruh Act (which imposes liability for intimidation by threats of violence) and that, having erroneously dismissed McCalden's claim for deprivation of civil rights under 42

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[1]David McCalden, now deceased, was originally the plaintiff in this action. Viviana McCalden, as administrator of David McCalden's estate, was substituted as plaintiff-appellant on July 15, 1991.

[2] "A" shall refer to Appendices attached to the petition for certiorari, followed by the page number.

U.S.C. Section 1983, the District Court should reconsider that claim to determine whether a cause of action is stated. (A15)[3]

STATEMENT OF FACTS

In 1984, McCalden entered into two written contracts with the CLA, one to present an exhibit entitled "Publishers of revisionist, libertarian and athiest research. Specializing in the defense of civil liberties for unpopular causes," and the other to present a program entitled "Free Speech and the Holocaust — An overview from several speakers of the severe censorship and intellectual terrorism which inhibits any objective, open discussion of this controversial subject." (A63) The exhibit and program were scheduled as part of the CLA's 86th Annual Conference which was to be held at Los Angeles in December, 1984. (A63)

Prior to the Annual Conference, McCalden's participation came to the attention of SWC, Hier and AJC. (A64-67) These parties, with City joining at some point after initial actions were taken, entered into a conspiracy to make a deliberate and concerted effort to organize and effect a campaign of escalating pressure tactics, solely for the purpose of forcing the CLA to cancel its contracts with McCalden and preventing McCalden from associating with or expressing his views to CLA members. (A64-73) SWC, Hier, AJC and City engaged in overt acts of intimidation and threats,[4] including: (1) Through AJC, they met privately with the CLA to inform them directly that if McCalden's contracts were not cancelled the Annual Conference would be disrupted, there would be property damage and the CLA would be "wiped out" (A65); (2) through SWC and Hier, they made extortionate threats to the CLA by threatening and organizing a demonstration which they knew and intended would

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[3] The Court of Appeals also upheld the dismissal with prejudice of McCalden's claims under 42 U.S.C. Sections 1985(3) and 1986. That final ruling is the subject of McCalden's petition for writ of certiorari, number 91-1699.

[4] These parties are jointly and severally liable for the acts of their co-conspirators. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940).

create a reasonable probability of property damage and of violence against McCalden and CLA members, and then offering to remove the threat if the CLA cancelled its contracts with McCalden and publicly dissociated itself from him (A67); (3) through SWC and Hier and AJC, they increased the likelihood of violence and intimidation by informing militant, violence-prone Jewish organizations about McCalden's exhibit and program in order to encourage these groups to disrupt McCalden's program and the Conference (A67-68); (4) through the Los Angeles Police Department, they intimidated the CLA and McCalden by informing the CLA that there would be violent demonstrations, and then by informing the CLA that City would not provide adequate police protection or security for the Annual Conference (A70-71); (5) through SWC and Hier, they increased the likelihood of violence and intimidation by inducing the Westin Bonaventure Hotel to rent SWC a conference room next to the room where McCalden's program was to be presented, so they could disrupt the program (A66); and (6) through the Los Angeles Police Department, they intimidated the CLA by informing its executive director that the police had received death threats against him if he allowed McCalden to speak and that these threats were "real," and then by informing the CLA director that City would not provide adequate police protection or security for the Conference (A70-71).

In furtherance of the conspiracy, SWC, Hier, AJC and City also engaged in overt acts of political and economic sanctions, including: (1) getting California Assembly Speaker Willie Brown, California Senate President David Roberti and other public officials to aid and abet the conspiracy by pressuring the CLA to cancel McCalden's program and exhibit (A68); (2) having Los Angeles Mayor Tom Bradley instruct the Los Angeles Library Commission to boycott the CLA's Annual Conference (A68); and (3) having the Los Angeles City Council pass a resolution publicly condemning the CLA and imposing severe economic sanctions by severing all ties with the CLA (A65-66).

The City Council's resolution is tantamount to a bill of attainder because it targeted Holocaust revisionists for their unpopular views. The City Council stated that it was taking this action

because the CLA had not given in to protests from SWC, AJC and others, thus indicating a clear intent to join with private parties in their conspiracy to prevent McCalden from expressing his views. Such intent is further indicated by the fact that the Council conducted its debate without notice to McCalden and without making any effort to verify the sweeping allegations on which the resolution was based. (A69-70, ER49-53 — transcript of Council meeting)[5] The full text of the Council resolution (ER48), which was incorporated in McCalden's complaint as Exhibit D, is as follows:

> WHEREAS, the CALIFORNIA LIBRARY ASSOCIATION is meeting in Los Angeles on December 1 to 5, 1984; and
>
> WHEREAS, the California Library Association has invited five speakers who are outspoken in their denial of the World War II Nazi Holocaust; and
>
> WHEREAS, the California Library Association has failed to respond to protests from the American Jewish Committee, the Simon Wiesenthal Center, Survivors of the Holocaust, a wide spectrum of Los Angeles' communal leadership and citizens of all faiths:
>
> THEREFORE, BE IT RESOLVED that the Los Angeles City Council goes on record that while we must protect the right of all Americans to express their views, there is no obligation to provide the forces of hatred such respected platforms. We therefore call on the California Library Association to recognize their grave error of judgment and urge them to remove these individuals from their program.
>
> FURTHER, that whatever City participation in the California Library Association, formal or informal, be immediately severed in protest of the California Library Association action.

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[5]"ER" shall refer to Excerpts of Record filed in the Ninth Circuit on August 15, 1988, followed by the page number.

After all of the foregoing actions were taken, the CLA gave up and cancelled its contracts with McCalden, and McCalden was not permitted to attend or to express his views concerning free speech and the Holocaust at the Annual Conference. (A65-74)[6]

REASONS FOR DENYING THE WRIT

The first three questions presented, *i.e.*, whether petitioner's conduct involving threats of violence and impositon of political and economic sanctions is privileged under the First Amendment, concern primarily the interpretation of facts alleged in respondent's complaint, and therefore are not proper subjects for review by this Court. *United States v. Johnston,* 268 U.S. 220, 227 (1925); *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981). The fourth question presented, *i.e.*, the pleading standard to be applied if all of defendants' conduct is *prima facie* protected by the First Amendment, assumes an interpretation of facts entirely in favor of petitioners, something

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[6] On remand, McCalden would seek leave to amend her complaint to allege the following additional facts: (1) the CLA became interested in permitting McCalden to exhibit his publications because public libraries in the Los Angeles area refused to accept such exhibits during their observance of "banned books week;" (2) McCalden's program on "Free Speech and the Holocaust" was to be moderated by a representative of the Los Angeles office of the ACLU; (3) the CLA initially cancelled McCalden's contracts after being threatened by AJC and told it would be "wiped out;" (4) after McCalden threatened to sue, the CLA reinstated his contracts, thus triggering the escalating campaign of pressure tactics which led to City's joining the conspiracy; (5) the Los Angeles Police Department's warning of death threats against the director of the CLA coupled with refusal to provide police protection occurred on the same day that the Los Angeles City Council notified the CLA that it had denounced the CLA and imposed severe economic sanctions against it; and (6) after McCalden's contracts were cancelled, SWC referred to the conspiracy in a fund raising letter to its members: "It was only because of swift action by the Simon Wiesenthal Center and the American Jewish Committee that the McCalden presentation was thwarted."

the Court of Appeals was not willing to do on a Rule 12(b)(6) motion. (A 9-10)

The Court of Appeals has remanded this case. Procedurally, it is still at the initial pleading stage. Since the Court of Appeals' decision is within the accepted and usual course of judicial proceedings, the petition for certiorari should be denied. *See*, Supreme Court Rule 10(a).

I

PETITIONERS' CONDUCT IS NOT PRIMA FACIE PROTECTED BY THE FIRST AMENDMENT

The petition for certiorari is based on an incomplete and incorrect statement of the facts alleged in McCalden's complaint. Contrary to what is stated in the petition (P2),[7] the CLA did not contract with McCalden to hear him discuss the Holocaust as a hoax. His exhibit and program concerned free speech and the Holocaust.

Petitioners did not merely advocate violence or a violent demonstration. (P10) AJC directly threatened disruption and property damage and stated that the CLA would be "wiped out" unless McCalden's contracts were cancelled. SWC and Hier directly threatened a demonstration which they intended to be violent unless the contracts were cancelled and the CLA publicly dissociated itself from McCalden. These threats were extortionate.

Petitioners did not merely engage in the use of vehement, caustic or rough language. (P14) SWC and Hier rented a conference room so they would have access to the hotel and an opportunity to disrupt McCalden's program. SWC, Hier and AJC increased the likelihood of disruption by encouraging militant, violence-prone Jewish organizations to participate in the demonstration. City, apparently believing violence was likely, nevertheless withdrew or refused to provide police protection. This

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[7] "P" shall refer to the petition for writ of certiorari, followed by the page number.

conduct amounts to intimidation. The intended victims could reasonably fear that the threats were being carried out.[8]

Petitioners cite many well-known First Amendment cases on advocacy. But the facts, viewed in a light favorable to respondent, as they must be on an F.R.Civ.P. 12(b)(6) motion, clearly indicate intimidation by threats of violence. SWC, Hier and AJC did not contact the CLA merely to advocate abstract concepts of violence and disruption; they used every means at their disposal, including direct threats and conduct calculated to cause disruption, to coerce the CLA to cancel McCalden's contracts. There is no First Amendment right to intimidate by threats of violence or to magnify threats of violence by refusing to provide police protection. Nor is there a First Amendment right intentionally to organize a violent demonstration or to plan disruption of a conference to prevent someone from speaking. On the facts alleged, the Ninth Circuit correctly distingushed *Brandenberg v. Ohio,* 395 U.S. 444 (1969) and *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982). Indeed, it was noted in the decision (A10-11) that this Court stated unequivocally in *Claiborne* that individuals who "engaged in violence or threats of violence . . . may be held responsible for the injuries that they caused." *Id.,* at 926.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING HEIGHTENED PLEADING STANDARDS

Petitioners themselves cite the leading Ninth Circuit case on heightened pleading standards. (P20) *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd.*, 542 F.2d 1076

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[8] Petitioners mislead this Court by including in their statement of the case (P4) respondent's allegation that the "real and only substantial" reason for the CLA's decision to cancel its contracts was concern about loss of support as a result of the Los Angeles City Council resolution. That allegation was pleaded in the alternative and only against the CLA on a breach of contract claim. The Court of Appeals' decision upholding this alternative pleading (A5-6) is not challenged in the petition for certiorari.

(9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977), involved a conspiracy to prevent McDonald's franchisees from obtaining building permits by the filing of frivolous appeals with the local permit appeals board. The court found that all of the alleged conduct was *prima facie* protected by the First Amendment and stated:

> "What we do hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct that is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Id.*, at 1082-83.

Petitioners also point out that this Ninth Circuit pleading standard has been restated in several other Ninth Circuit cases and cited with approval in other circuits. (P20, n.14) No conflict among the circuits is indicated. Instead, petitioners argue that a conflict among the circuits must be implied from the fact that the *Franchise Realty* standard is not discussed in the decision in this case. Even if that silence created a conflict, however, it would be solely within the Ninth Circuit and therefore more appropriately resolved by that circuit. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

But there is no reason to assume that a conflict exists, since the Court of Appeals explicitly distinguished conduct that is *prima facie* protected (petitioning, organizing a demonstration) from conduct that is not (threats of violence, disruption). (A7, 10-11) The heightened pleading standard does not apply to conduct that is not *prima facie* protected by the First Amendment. The lower court's decision was based on a finding that at least some of petitioners' conduct was not protected by the First Amendment. Conduct that was found to be privileged was specifically excluded as a basis for liability. (A7) Petitioners' argument, therefore, is really that the Court of Appeals' interpretation of facts alleged in the complaint is incorrect. Petitioners do not argue for any change in the existing law on heightened pleading standards; they argue that existing law was not properly applied in this case. Such an error does not warrant correction by this Court. Certiorari should

not be granted merely to affirm settled law. *Estelle v. Gamble*, 429 U.S. 97, 115 (1976).

CONCLUSION

There can be no doubt that McCalden was deprived of his First Amendment rights. Since there is substantial doubt that all of petitioners' conduct is *prima facie* protected by the First Amendment, this action should not be summarily dismissed solely to avoid a possible chilling effect on petitioners' exercise of First Amendment rights.

Respectfully submitted,

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No. 91-1643

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THE SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES, RABBI MARVIN HIER, THE AMERICAN JEWISH COMMITTEE AND THE CITY OF LOS ANGELES,
Petitioner,
VS.
VIVIANA MCCALDEN, AS ADMINISTRATOR OF THE ESTATE OF DAVID MCCALDEN,
Respondent.

BRIEF OF THE ANTI-DEFAMATION LEAGUE ON BEHALF OF ITSELF AND THE NATIONAL ASSOCIATION OF EVANGELICALS, THE CHRISTIAN LEGAL SOCIETY, THE AMERICAN JEWISH CONGRESS, THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, AND THE JEWISH COMMUNITY RELATIONS COMMITTEE, JEWISH FEDERATION COUNCIL OF GREATER LOS ANGELES, *AMICI CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interests of the Amici Curiae 1

Argument 4

I.

An Exceptionally Important Issue of Constitutional Law is Raised by the Holding of the Court of Appeals for The Ninth Circuit Reinstating Respondent's Claim of Interference With a Contractual Relationship 4

A. The Holding of The Ninth Circuit Has Significant National Implications for the Exercise of First Amendment Freedoms 4

B. The Decision of The Ninth Circuit Applies a Patently Incorrect First Amendment Standard 7

C. Application of the Correct First Amendment Standard Requires That the Claim of Tortious Interference with Contract be Dismissed Pursuant to Fed. R. Civ. P. Rule 12(b)(6) 12

II.

A Closely Related Issue of Constitutional Law is Raised by the Holding Reinstating the Claim Under California Civil Code Section 51.7 14

III.

Conclusion 15

Appendix

TABLE OF AUTHORITIES

Cases

	Page
Abrams & Fox, Inc. v. Briney, 39 Cal.App.3d 604 (1970)	7
Barger v. Playboy Enterprises, Inc., 564 F.Supp. 1151 (N.D.Cal. 1983), *aff'd.*, 732 F.2d 163 (9th Cir.), *cert. denied*, 469 U.S. 853 (1984)	12
Brandenberg v. Ohio, 395 U.S. 444 (1969)	9
DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568 (1988)	5
Church of Scientology Intern v. Eli Lilly & Co., 778 F.Supp. 661 (S.D.N.Y. 1991)	12
Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979)	15
H & M Assoc. v. City of El Centro, 109 Cal.App.3d 399 (1980)	7
Healy v. James, 408 U.S. 169 (1972)	11
Laskey v. American Broadcasting Co., Inc., 606 F.Supp. 934 (S.D.N.Y. 1985)	12
NAACP v. Button, 371 U.S. 415 (1963)	7
NAACP v. Claiborne Hardware Co., 458 U.S. 568 (1982)	7, 5, 9, 11, 13
New York Times v. Sullivan, 376 U.S. 254 (1964)	4, 10
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	9, 10
Pacific Gas & Elec. Co. v. Bear, Stearns Co., 50 Cal.3d 1118	5
Smith v. California, 361 U.S. 147 (1959)	12
Speiser v. Randall, 357 U.S. 513 (1958)	6
St. Amant v. Thompson, 390 U.S. 727 (1968)	11
Terminiello v. Chicago, 337 U.S. 1 (1949)	9
Thornhill v. Alabama, 310 U.S. 88 (1940)	5
Tinker v. Des Moines School District, 393 U.S. 503 (1969)	10
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	6

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES

Page

Constitutional Provisions and Statutes

California Civil Code, Section 51.7 (Unruh Act) 8, 14, 15

U.S. Constitution, First Amendment ..... *passim*

Other Authorities

Restatement of the Law of Torts (Second) Section 766 (1977) 7

No. 91-1643

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THE SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES, RABBI MARVIN HIER, THE AMERICAN JEWISH COMMITTEE AND THE CITY OF LOS ANGELES,
Petitioner,

VS.

VIVIANA MCCALDEN, AS ADMINISTRATOR OF THE ESTATE OF DAVID MCCALDEN,
Respondent.

BRIEF OF THE ANTI-DEFAMATION LEAGUE ON BEHALF OF ITSELF AND THE NATIONAL ASSOCIATION OF EVANGELICALS, THE CHRISTIAN LEGAL SOCIETY, THE AMERICAN JEWISH CONGRESS, THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, AND THE JEWISH COMMUNITY RELATIONS COMMITTEE, JEWISH FEDERATION COUNCIL OF GREATER LOS ANGELES, *AMICI CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This brief is submitted with the consent of the parties. Originals of the letters reflecting such consent are being filed with the Clerk of the Court simultaneously with the filing of this brief.

INTERESTS OF THE AMICI CURIAE

The amici, national civic and religous organizations, are strongly committed to the First Amendment freedom of expression. But this is not merely as a matter of principle. The amici *depend* on the freedom of expression to carry out their various and sometimes controversial missions on a day to day basis. Although

they are not always on the same side of the substantive issues, the amici join in urging a grant of certiorari in this important and disturbing case. The Ninth Circuit decision below opens the door to a burdensome and truly chilling wave of tort litigation against amici and others for the mere exercise of their First Amendment freedoms.

Amicus Anti-Defamation League ("ADL") was organized in 1913 to advance goodwill and understanding among Americans of all races and creeds, and to combat racial and religious prejudice in the United States. ADL is dedicated to exposing and counteracting anti-Semitism and bigotry of every kind and promoting and protecting civil rights and liberties.

ADL implements its mandate by educating and informing the Jewish community and the general public about prejudice and discrimination. One major component of ADL's program is communication regarding extremists and hate groups or others whose actions and philosophies pose a threat to the mutual respect and tolerance upon which the survival of our diverse and pluralistic society depends.

In pursuing its fight against racism, anti-Semitism, and other forms of bigotry, ADL has long relied on the free speech guarantee of the First Amendment. Experience has shown that best antidote for "bad speech" is more speech, and that when hatred and bigotry are exposed, the vast majority of Americans will reject them. Yet ADL's speech activities often involve contractual relationships, as when racist groups have been given platforms in concert halls or on media broadcasts, or their literature has been given space in bookstores. From this perspective, the ADL respectfully offers the Court its expertise on the impact the threat of contract interference litigation can have on the exercise of First Amendment rights and the appropriate balance which should be struck between the free speech and contractual rights at issue in this case.

The other amici have similar concerns. Amicus National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals. It includes some 45,000 churches from

74 denominations and serves a constituency of approximately 15 million people.

Amicus Christian Legal Society ("CLS") is a nonprofit professional association, founded in 1961, with a nationwide membership of 4,000 Christian attorneys, law students, law professors, and judges. The CLS also has a legal information and advocacy arm, the Center for Law & Religious Freedom, founded in 1979.

NAE and CLS are both extremely disturbed by the prospect of harassing litigation against them, or any other civic or religious organization, under the theories sanctioned by the Ninth Circuit's decision below. NAE and CLS engage in advocacy on a broad range of issues including abortion, condom distribution, and public school textbooks. As many of these issues involve contractual relationships, the Ninth Circuit's decision threatens to allow NAE's and CLS's First Amendment advocacy to be attacked through burdensome tort litigation.

Also joining in these concerns and this brief are other major Jewish organizations. The amicus American Jewish Congress ("AJC") was founded in 1918 to protect the civil, economic, political, and religious rights of American Jews. AJC's ability to fulfill this role depends on its ability to speak freely and vigorously. The decision of the Ninth Circuit below impinges on AJC's freedom to speak.

In addition, amicus National Jewish Community Relations Advisory Council ("NJCRAC") is an umbrella organization consisting of the following national member organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the United States of America, National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America, Women's League for Conservative Judaism, Women's American ORT, as well as 117 community member organizations (see Appendix) representing all major Jewish communities in the United States. As the national planning and coordinating body for the Jewish community-relations field, dedicated to preserving the security of

the Jewish community and of the principles embedded in the Bill of Rights, the NJCRAC believes that freedom of expression is an essential bulwark in maintaining the individual, group, and political equality of all Americans.

Finally, amicus Jewish Community Relations Committee, Jewish Federation Council of Greater Los Angeles, an umbrella organization representing some 500 community agencies in the Greater Los Angeles area, joins in this brief separately given its special interest in and familiarity with the area where the instant case arose. Human relations agencies in Los Angeles have their work cut out for them, and can ill afford the additional burdens of reactive litigation just for speaking out forcefully on public issues that happen to involve contracts.

ARGUMENT

I.

AN EXCEPTIONALLY IMPORTANT ISSUE OF CONSTITUTIONAL LAW IS RAISED BY THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT REINSTATING RESPONDENT'S CLAIM OF INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP.

A. THE HOLDING OF THE NINTH CIRCUIT HAS SIGNIFICANT NATIONAL IMPLICATIONS FOR THE EXERCISE OF FIRST AMENDMENT FREEDOMS.

An essential teaching of *New York Times v. Sullivan*, 376 U.S. 254 (1964), is that state tort law carries no "talismanic" power to limit the reach of First Amendment freedoms. Id. at 269. Instead the application of tort sanctions must itself "be measured by standards that satisfy the First Amendment." Id.

In the present case a dividend panel of the United States Court of Appeals for the Ninth Circuit ignored this fundamental teaching. Over strenuous constitutional objection,[1] and without any

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[1] *See* Brief of Defendant-Appellees the Simon Wiesenthal Center and Rabbi Marvin Hier, at 14-41.

First Amendment analysis whatever, the panel reinstated respondent's claim of tortious interference with contract. *See* 919 F.2d 538, 543 (9th Cir. 1990). Only in response to the powerful dissents of Judges Kozinski and Reinhardt from an order rejecting petitioners' suggestion for rehearing en banc did the panel see fit casually to observe that "liability for interference with contractual relations" must be predicated upon "[s]peech or conduct that falls outside the protection of the First Amendment . . ." Appendix to Petition for Writ of Certiorari ("App.") at A7 n.4.

The constitutionally important question, of course, is exactly what speech interfering with contractual relations is protected by the First Amendment. The panel opinion makes no effort to address this question, whose vivid significance is manifest in this very case, in which speech about matters of high public concern has been circumscribed and chilled because of its negative impact on a contractual relationship.

Vital expression about public issues will often impair contractual relationships.[2] This is frequently the very purpose and effect of efforts to disseminate "information concerning the facts of a labor dispute," *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940), *Debartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568 (1988), or of efforts to persuade others to support demands for "Racial Justice." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 898-901 (1982). It may be the purpose and effect of legal and peaceful demonstrations organized by groups seeking to dissuade medical clinics from performing abortions, or of informational leafletting designed to pressure local supermarkets to cease selling pesticide-treated food. To crudely

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[2]The tort of contractual interference does not require an actual breach of contract:

> Plaintiff need not allege an actual or inevitable breach of contract in order to state a claim for disruption of contractual relations. We have recognized that interference with the plaintiff's performance may give rise to a claim for interference with contractual relations if plaintiff's performance is made more costly or more burdensome.

Pacific Gas & Electric Co. v. Bear Stearns Co., 50 Cal.3d 1118, 1129 (1990).

cabin speech about matters of public concern within the ring of existing contractual relationships would be to abandon the First Amendment aspiration to protect "the right to differ as to things that touch the heart of the existing order." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943).

The precise constitutional question posed by this case, then, is whether and under what circumstances speech negatively affecting contractual relations may be penalized by a tort. Lack of clarity on this question chills speech, as amicus Anti-Defamation League ("ADL") has reason to know firsthand. A primary institutional mission of the ADL is to oppose all forms of anti-Semitic propaganda. This mission sometimes entails the disagreeable task of informing bookstores of the anti-Semitic nature of books they have contracted to sell, or radio stations of the anti-Semitic nature of the programs they have contracted to broadcast, or concert halls of the anti-Semitic nature of the speakers they have contracted to feature. Although this speech involves matters of public concern, it is fettered and constrained by uncertainty over the reach of the tort of contractual interference. ADL is forced to "steer far wider of the unlawful zone" for fear of potential liability. *Speiser v. Randall,* 357 U.S. 513, 526 (1958). The decision of the Ninth Circuit in this case will deepen this inhibition.

ADL's experience is by no means unique. Members of amicus National Association of Evangelicals or of amicus Christian Legal Society, for example, may have occasion to demonstrate against school boards' contracts to distribute condoms or to purchase particular textbooks. The opinion of the Ninth Circuit casts a pall of imprecision deeply inhibiting to these protected First Amendment activities. In fact all the amici joining this brief believe, despite their occasional political differences, that a similar chill will extend to any advocacy group that stakes out strong positions in matters of passionate public controversy.

It is a matter of constitutional moment, therefore, that the relationship between First Amendment freedoms and the tort of contractual interference be clearly and precisely articulated. That is why Judge Kozinski in his dissent characterized this case as one "of exceptional importance." App. at A39.

B. THE DECISION OF THE NINTH CIRCUIT APPLIES A PATENTLY INCORRECT FIRST AMENDMENT STANDARD.

The tort of interference with contractual relationships does not commonly raise serious constitutional issues because its usual function is to regulate commercial behavior. That is plainly not the function of the tort in this case, however, where, as the Ninth Circuit noted, the Complaint contains no allegation of "some identifiable pecuniary or economic benefit accrue[d] to defendants that formerly accrued to plaintiff," App. at A6, and where the behavior at issue consists primarily of noncommercial speech about matters of public concern. Given these two conditions, the reach of the tort's sanctions must constitutionally be defined with that "precision of regulation" that is "the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button,* 371 U.S. 415, 438 (1963).

The essence of the applicable First Amendment standard was set forth by this Court in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 918 (1982): "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." The tort of contractual interference imposes damages on the basis of conduct whose "proximate result" is the impairment of a contract. *Abrams & Fox, Inc. v. Briney,* 39 Cal.App.3d. 604, 608 (1974).[3] It follows directly from *Claiborne Hardware* that if the conduct alleged to have proximately caused the impairment of a contract of speech, and if the speech is itself "protected activity," the application of the tort is forbidden by the First Amendment.

Application of this standard obviously bars many of the allegations in the instant Complaint. Even the Ninth Circuit panel recognized (although belatedly) that the efforts of defendants American Jewish Committee, Simon Wiesenthal Center, Inc., and Rabbi Marvin Hier (hereinafter referred to collectively as "petitioners") to lobby city and state officials are "plainly pro-

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[3]*See H & M Assoc. v. City of El Centro,* 109 Cal.App.3d 399, 405 (1980); *Restatement of the Law of Torts (Second)* Section 766 (1977).

tected by the First Amendment," and hence that the allegations that these efforts proximately caused an impairment of contract are constitutionally prohibited. *Compare* App. at A7 n.4 *with* App. at A65-A66, A68 (Plaintiff's Second Amended Complaint Nos. 27-28, 36-37).

Although the Panel's opinion is not entirely clear, it apparently rejected petitioners' First Amendment defense because it found that

> Liberally construed, the complaint contains one allegation of a specific threat — the AJC's alleged statement to the CLA [California Library Association], "at the urging and request and with the knowledge, approval and cooperation of Defendants Marvin Hier ... and Simon Wiesenthal Center" that if the contracts with appellant were not canceled, "[d]efendant CLA's 1984 Annual Conference would be disrupted, there would be damage to property and the CLA would be 'wiped out' "[4]

App. at A9. The exact meaning of this "specific threat," however, requires some clarification.

Respondent herself has acknowledged that the phrase "wiped out," which appears in paragraph 24 of the Second Amended Complaint (App. A65), comes from a newspaper article that refers to the potentially devasting effects on CLA of "organized Jewish demonstrations." Appellant's Brief before the United States Court of Appeals for the Ninth Circuit, at 32-35. And the Ninth Circuit Panel makes clear in its opinion that its discussion of property damage and disruption refers to petitioners' alleged threat "to disrupt [plaintiff's] presentation by creating a demonstration that [petitioners] knew and intended 'would create a reasonable probability of property damage and of violence against Plaintiff and members of Defendant CLA'." App. at A10. *See* Second Amended Complaint No. 32, at App. A67.

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[4]The passage quoted in text comes from the section of the Panel's opinion that discusses the violation of the Unruh Act. We assume that the Ninth Circuit would apply the same analysis to the tort claim.

The conduct which the Ninth Circuit found unprotected by the First Amendment, therefore, consists of "threats" to engage in effective and potentially violent demonstrations. It is clear, however, the demonstrations are constitutionally protected, even if accompanied by a "reasonably probability" of property damage and violence, so long as such damage and violence neither occurs nor is imminently incited. *Brandenberg v. Ohio*, 395 U.S. 444, 447 (1969). That is the lesson of *Terminiello v. Chicago*, in which this Court unequivocally extended constitutional immunity to an assembly that "stirred people to anger, invited public dispute, or brought about a condition of unrest," 337 U.S. 1, 5 (1949), even in the context of "a riot and . . . speech that provoked a hostile mob and incited a friendly one, and threatened violence between the two." Id. at 13 (Jackson, J., dissenting).

Petitioners would thus be constitutionally immune from liability for contractual interference if the CLA had canceled the contract because petitioners had staged a tempestuous, unruly but ultimately nonviolent demonstration. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 915-20 (1982). Hence the Ninth Circuit is forced into the anomalous position of concluding that petitioners' "threat" to hold such a demonstration is constitutionally less protected than the demonstration itself. This position is surely incorrect, for if a demonstration is constitutionally protected from the regulation of tort law, so also must be the stated intention to engage in the demonstration.

It is true that the recipient of a "threat" of a potentially disruptive demonstration might breach a contractual relationship because of his fear that the demonstration might turn violent, rather than because of the persuasive power of the demonstration itself.[5] But is is constitutionally unacceptable to convert the

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[5]In this context the concept of "persuasion" must be broadly construed. As this Court stated in *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971): "The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper."

recipient of such a "threat" into a censor of precious First Amendment rights. The call for constitutionally protected activity must itself be constitutionally protected. *New York Times Co. v. Sullivan, supra*, 376 U.S. 254, 266. If petitioners had circulated leaflets calling for demonstrations against CLA's agreement with plaintiff, and if these leaflets had themselves caused CLA to breach the contract, petitioners could not constitutionally be held liable for the tort of contractual interference. It would be a matter of indifference whether CLA's breach had been caused by the persuasive power of the potential demonstrations or instead by a fear of their possible violence.

In effect, therefore, the holding of the Ninth Circuit cedes everything to the anxieties of an auditor, and it offers nothing to the rights of a speaker to announce intentions to engage in constitutionally protected activity. It thus subordinates speech to "undifferentiated fear or apprehension," which, "in our system, . . . is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969).[6] It follows that one must distinguish between an expression that communicates an actual threat of violence and an expression that announces an intention to engage in protected activity which an auditor fears might turn violent. The latter merits constitutional protection; the former does not.

The question posed by this case is how these two forms of expression may be constitutionally distinguished. When speech occurs in the course of volatile political controversy, this Court has been careful to hold that the distinction between protected and unprotected speech must be drawn clearly and precisely:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence or by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded.

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[6]The Ninth Circuit holding has the further and serious disadvantage of creating an incentive to express fundamental disagreements through demonstrations that may actually turn violent, rather than through the admittedly peaceful conveyance of information about such demonstrations.

NAACP v. Clairborne Hardware Co., 458 U.S. 886, 916 (1982). Precise regulation serves the important function of minimizing the chill on protected speech.

This function would not be served by a rule that uses the reactions of an auditor to distinguish between protected "threats" of potentially disruptive demonstrations and unprotected threats of violence. Such a rule would hold a speaker hostage to the apprehensions of his addressee, and would have particularly perverse consequences in a context like this, where an auditor has every incentive to "hear" threats of violence so as to establish a barrier against a subsequent suit for breach of contract, or at least so as to set up a potential indemnitor.

In analogous situations this Court has achieved the requisite degree of legal precision by distinguishing protected from unprotected speech through some form of *scienter* requirement. The classic example is defamation, where the "actual malice" rule demands that a public official or public figure plaintiff prove that a "defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 729 (1968). This Court invoked a similar solution to the problem of avoiding the chill that would result from imposing sanctions "solely because of a citizen's association with an unpopular organization," for it interpreted the Constitution as demanding proof "establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." *Healy v. James*, 408 U.S. 169, 186 (1972). And, in order to avoid the "self-censorship" that would occur if booksellers were held strictly liable for possessing obscene writings, this Court has held that the First Amendment mandates that any "constitutionally permissible prosecution" include some form of a "scienter requirement." *Smith v. California*, 361 U.S. 147, 154 (1959).

In the circumstances of this case, therefore, the First Amendment ought analogously to require that the distinction between protected and unprotected speech be located in the intentions of the speaker. Petitioners have a right to constitutional protection if their intent was merely to affect the relevant contractual relationship by virtue of proposed demonstrations, however volatile; but

they have no such right if their intent was instead to affect the contract rights through threats of violence.

C. APPLICATION OF THE CORRECT FIRST AMENDMENT STANDARD REQUIRES THAT THE CLAIM OF TORTIOUS INTERFERENCE WITH CONTRACT BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(6).

This is not a case in which the tort of contractual interference involves the regulation of commercial affairs. There is no claim here of economic advantage. Because the speech involved in this case is concededly about matters of vivid public concern, the First Amendment requires allegation and proof of an interference with contract through speech that intended to threaten violence, as distinguished from speech that merely "threatened" demonstrations carrying the potential for violence. Just as a complaint for defamation by a public figure will be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim if it fails to allege the First Amendment requirement of actual malice, *see, e.g., Church of Scientology Intern v. Eli Lilly & Co.*, 778 F.Supp. 661, 666 & n.3 (S.D.N.Y. 1191); *Lasky v. American Broadcasting Co., Inc.*, 606 F.Supp. 934, 937 (S.D.N.Y. 1985); *Barger v. Playboy Enterprises, Inc.*, 564 F.Supp. 1151, 1156-57 (N.D. Cal. 1983), *aff'd,* 732 F.2d 163 (9th Cir.), *cert. denied,* 469 U.S. 853 (1984), so also should a complaint for tortious interference with contract be dismissed if it fails to allege the First Amendment requirement of scienter or specific intention.

In this case, as the panel of the Ninth Circuit stated, even the most generous interpretation of the Complaint can find only the allegation that petitioners "intended to disrupt [plaintiff's] presentation by creating a demonstration that appellees knew and intended 'would create a reasonable probability of property damage and of violence against Plaintiff and the members of Defendant CLA.'" App. at A10. There are no claims that petitioners "authorized, directed, or ratified" violence.[7] *NAACP v. Claiborne*

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[7]The only allegations even vaguely pertinent to such claims are that the petitioners rented a conference room in the Westin Bonaventure Hotel during the evening when plaintiff planned to present his program,

Hardware Co., 458 U.S. 886, 927 (1982). There are no claims, as Judge Kozinski pointed out in his dissent, that petitioners "threatened to break anybody's kneecaps, or to plant a bomb, or to have goons set fire to [plaintiff's] exhibit." App. at A41. There are no claims that the demonstrations planned by petitioners were not bona fide expressions of political conviction, or that petitioners' references to these demonstrations were actually meant to convey threats of violence, as distinguished from "threats" to assemble in ways that carried the potential for violence.

It follows that the decision of the Ninth Circuit Court of Appeals was incorrect, and that the federal district court was justified in dismissing respondent's claim for tortious interference with contract pursuant to Fed. R. Civ. P. 12(b)(6).

II.

A CLOSELY RELATED ISSUE OF CONSTITUTIONAL LAW IS RAISED BY THE HOLDING REINSTATING THE CLAIM UNDER CALIFORNIA CIVIL CODE SECTION 51.7.

California Civil Code Section 51.7, popularly known as the Unruh Act, provides:

> All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property, because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.

Second Amended Complaint §§ 29-30, App. at A66-A67, and that petitioners informed certain "militant" Jewish organizations about the content of his "exhibit and program." Second Amended Complaint §§ 34-35, App. at A67-A68. Even if these allegations were accepted as true, they would obviously not establish that petitioners authorized, directed, ratified, or even condoned violence.

The district court dismissed a claim that petitioners had violated the Unruh Act. The Ninth Circuit, over vigorous constitutional objection,[8] reinstated the claim.

The factual allegations supporting the Unruh Act claim are the same as those that support the claim for tortious interference with contract. Second Amended Complaint §§ 62-65, App. at A74-A75. The two claims thus raise essentially the same fundamental constitutional question. That question is whether a State may penalize speech which, in a context of a volatile political controversy, "threatens" to engage in constitutionally protected activity. It makes no constitutional difference whether penalties are imposed pursuant to a statute or to a common law tort. What matters is whether a State may sanction as "intimidation" the announced intention to assemble in potentially disruptive demonstrations.

Although it virtually ignored this question in its original opinion, 919 F.2d 538, 545, the Ninth Circuit panel's amended decision argues that the expression of such an intention may be penalized if it is "privately communicated," as distinguished from being broadcast through "public speeches." App. at A10-11. But this hastily constructed argument flatly contradicts *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16 (1979), which holds that First Amendment protections extend to speech "communicate[d] privately" as well as to speech "spread . . . before the public." The constitutionally decisive question is whether speech involves matters of public concern, not whether it is disseminated through public or private channels. The speech at issue in this case clearly does involve matters of public concern.

The decision of the Ninth Circuit, if left standing, will transform the Unruh Act into an instrument of repression, ready for use by controversial groups willing to employ litigation to silence those who would assemble to oppose them. The breadth of this interpretation of the Unruh Act, far exceeding the inherently more limited scope of the tort of contractual interference, ought

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[8] *See* Brief of Defendant-Appellees the Simon Wiesenthal Center and Rabbi Marvin Hier, at 14-41.

to be deeply disturbing to those who care to preserve the vital national debate guaranteed by the First Amendment.

Because there is no allegation here that petitioners intended to threaten violence, as distinguished from "threatening" to engage in demonstrations that carried the potential for violence, the decision of the Ninth Circuit Court of Appeals was incorrect. The claim for violation of the Unruh Act ought to have been dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

III.

CONCLUSION

This case raises exceptionally important issues of First Amendment law. The decision of the Ninth Circuit gave only the most casual and inadequate attention to these issues, and as a consequence reached conclusions that are deeply inconsistent with essential principles of freedom of expression. The effect of the Ninth Circuit decision is likely to be profound and far-ranging. We therefore respectfully urge this Court to grant certiorari in this case.

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APPENDIX

MEMBER ORGANIZATIONS OF THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

Birmingham JCC
Greater Phoenix Jewish Federation
Tucson Jewish Federation of Southern Arizona
Greater Long Beach and West Orange County Jewish Community Federation
Los Angeles CRC of Jewish Federation-Council
Oakland Greater East Bay JCRC
Orange County Jewish Federation
Sacramento JCRC
San Diego CRC of United Jewish Federation
San Francisco JCRC
Greater San Jose JCRC
Greater Bridgeport Jewish Federation
Greater Danbury CRC of Jewish Federation
Eastern Connecticut Jewish Federation
Greater Hartford CRC of Jewish Federation
New Haven Jewish Federation
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
JCRC of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington JCC
South Broward Jewish Federation
Greater Fort Lauderdale Jewish Federation
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Greater Orlando Jewish Federation
Palm Beach County Jewish Federation
Pinellas County Jewish Federation
Sarasota-Manatee Jewish Federation
South County Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council

Metropolitan Chicago JCRC of the Jewish United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis JCRC
South Bend Jewish Federation of St. Joseph Valley
JCRC of Indiana
Greater Des Moines Jewish Federation
Lexington Central Kentucky Jewish Federation
Louisville Jewish Community Federation
Greater Baton Rouge Jewish Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish Federation-
Community Council
Baltimore JCRC
Greater Boston JCRC
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit JCC
Flint Jewish Federation
Minneapolis Minnesota and Dakotas JCRC-
Anti-Defamation League
Greater Kansas City Jewish Community Relations Bureau
St. Louis JCRC
Omaha JCR Committee of Jewish Federation
Atlantic County Federation of Jewish Agencies
Central New Jersey Jewish Federation
Clifton-Passaic Jewish Federation
Delaware Valley Jewish Federation
Metrowest United Jewish Federation
Greater Middlesex County Jewish Federation
Northern New Jersey JCRC
Southern New Jersey JCRC of Jewish Federation
Albuquerque JCC
Binghamton Jewish Federation of Broome County
Greater Buffalo Jewish Federation
Elmira CRC of Jewish Welfare Fund

Greater Kingston Jewish Federation
New York JCRC
Northeastern New York United Jewish Federation
Greater Orange County Jewish Federation
Rochester Jewish Community
Syracuse Jewish Federation
Utica Jewish Federation
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati JCRC
Cleveland Jewish Community Federation
Columbus CRC of Jewish Federation
Greater Dayton CRC of Jewish Federation
Greater Toledo CRC of Jewish Federation
Youngstown JCRC of Jewish Federation
Oklahoma City JCC
Tulsa JCC
Portland Jewish Federation
Allentown CRC of Jewish Federation
Erie JCC
Greater Philadelphia JCRC
Pittsburgh CRC of United Jewish Federation
Scranton-Lackawanna Jewish Federation
Greater Wilkes-Barre Jewish Federation
Providence CRC of Rhode Island Jewish Federation
Charleston JCR Committee
Columbia CRC of Jewish Welfare Federation
Memphis JCRC
Nashville and Middle Tennessee Jewish Federation
Austin JCC
Greater Dallas JCRC of Jewish Community Federation
El Paso JCR Committee
Fort Worth Jewish Federation
Greater Houston Jewish Federation
San Antonio JCR of Jewish Federation
Newport News-Hampton United Jewish Community of the Virginia Peninsula
Richmond Jewish Community Federation
Tidewater United Jewish Federation

Greater Seattle Jewish Federation
Madison JCC
Milwaukee Jewish Council

(4)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

REPLY TO BRIEF IN OPPOSITION 1

CONCLUSION 5

TABLE OF AUTHORITIES

Cases:

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 2

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) . . 4

New York Times v. Sullivan, 376 U.S. 254 (1964) 4

Constitutional Provisions, Statutes and Rules:

U.S. Constitution, First Amendment . . . . . *passim*

REPLY TO BRIEF IN OPPOSITION

The final sentence of McCalden's brief confirms that the First Amendment issues presented in the petition are ripe and warrant plenary review: McCalden forthrightly claims that the decision below entitles him to subject petitioners to litigation and a damages trial for threatening a counter-demonstration against his speech, despite "a possible chilling effect on petitioners' exercise of First Amendment rights." Brief in Opposition ("Br.Opp.") 9. Five dissenting judges of the Ninth Circuit found that proposition outrageous and fraught with peril for free expression. A writ of certiorari is in order.

I.

With respect to the first three Questions Presented, Respondent McCalden does not even try to refute the First Amendment arguments advanced by the petition and the dissents below. Instead, the brief in opposition rests entirely on the assertion that the petition disputes the facts alleged in the complaint. Br.Opp. 5-7. Contrary to McCalden's efforts at obfuscation, the petition and all of the opinions below "deem the complaint's allegations to be true." (A9)(panel majority opinion). Indeed, McCalden's belated attempt in his brief to spice up the Second Amended Complaint retroactively shows that even he now recognizes its deficiencies. *See* Br.Opp. 5 n.6.[1] The court below found no claims that petitioners authorized, directed, or ratified violence. The panel majority and all the dissenters agreed that, even "[l]iberally construed," the complaint contains only "one allegation of a specific threat." (A9). *See also*

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[1] McCalden's proffered supplement to the complaint is not only out of order, it is also the consequence of his own deliberate strategic choice. When the District Court dismissed the Second Amended Complaint, it granted McCalden leave to file a Third Amended Complaint. (A29-31). McCalden declined, choosing instead to appeal the dismissal to the Ninth Circuit. During oral argument on the Motion to Dismiss, McCalden's counsel acknowledged to the District Court that the Second Amended Complaint already contained all of the factual allegations that McCalden was able to make. Tr. of Proceedings on Nov. 17, 1986 at p. 21 (Excerpts of Record filed with the Court of Appeals at 86). The allegations that matter are those made in the Second Amended Complaint, as authoritatively and unanimously construed by the courts below, not those that McCalden irresponsibly seeks to sneak into the record now.

A42-43 (Kozinski, J., dissenting); A53 (Reinhardt, J., dissenting). Proceeding on the basis that "all reasonable inferences are to be drawn in favor of the non-moving party," the Court of Appeals found that McCalden "alleges that the appellees intended to disrupt his presentation by creating a demonstration that appellees knew and intended 'would create a reasonable probability of property damage and of violence.'" (A10).

Assuming this allegation to be true, the issue posed is clear-cut: petitioners and the dissenters below believe that threatening or organizing a demonstration against another's speech is protected expression that is not actionable in tort or under civil rights statutes. In contrast, the panel majority held that the First Amendment does not protect petitioners from being put to trial for planning "a demonstration" that carried "a reasonable probability of property damage and of violence" (A10), *solely* because petitioners allegedly communicated their plans to the CLA in private rather than through public proclamations. (A10-11). *See* Petition at 14-16. That pivotal distinction contravenes a unanimous decision of this Court, *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), and warrants plenary review. McCalden has not a single word to offer in rebuttal of this crucial point.

The danger the decision below poses to free expression cannot be dispelled by the Ninth Circuit's mere incantation (in a footnote) of the truism that parties cannot be held liable for "activities plainly protected by the First Amendment." (A7 n.4). The holding below, and the remand for a trial on damages allegedly flowing from petitioners' plans to stage a counter-demonstration, reveal that the Court of Appeals' caveat was mere lip service. *See* Petition at 5, 18.

Petitioners certainly do not ask this Court to construe the First Amendment as an impenetrable shield against lawsuits alleging extortion by private or public parties or a deliberate conspiracy by public officials to withhold police protection.[2] Petitioners claim

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[2] McCalden himself describes the alleged "extortionate threats" he attributes to petitioners as nothing more than "threatening and *organizing*

only a right to be free from liability for speech that is protected by the First Amendment. McCalden concedes that the trial he seeks — the trial that the decision below expressly allows — may have a "chilling effect on petitioners' exercise of First Amendment rights." Br.Opp. at 9. Indeed, he candidly concedes that at trial he will seek damages based on petitioners' "threatening and organizing a demonstration" (Br.Opp. 2); on their "acts of political and economic sanctions"; on their petitions to government officials encouraging official condemnation of McCalden's anti-Semitism and the CLA's involvement with him; and on the Los Angeles City Council's resolution — which McCalden quotes at length as if to underscore what he deems its unprotected character — denouncing the CLA and boycotting its conference. (Br.Opp. 3).[3]

If McCalden, when he was given multiple opportunities by the District Court, had framed a complaint with specific allegations of actionable conduct that did not sweep within its grasp expression protected by the First Amendment, then he might have been entitled to proceed to trial on such claims. But he is not entitled to chill the expression of his opponents in a bitter ideological dispute by subjecting them to litigation of damage claims based on their successful opposition to him and his ideas in the political arena.

II.

With respect to the fourth Question Presented, respondent does not contest the argument for a heightened standard of review for complaints seeking damages for conduct that is *prima facie* protected by the First Amendment. McCalden largely concedes the point but asserts that it has no relevance here.

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a demonstration" which would "create a reasonable probability of property damage and violence." (Br.Opp. 2-3)(emphasis added).

[3] In his efforts to camouflage these concessions behind a smokescreen of distracting detail, McCalden leaves behind the allegations of his own amended complaint and peppers the Court with new allegations that likewise seek damages for protected expression, such as petitioners' alleged nefarious petitioning of the city government in an "escalating campaign of pressure tactics." (Br.Opp. 5 n.6).

First, McCalden admits that his tortious interference and other claims create a "chilling effect on petitioners' exercise of First Amendment rights." (Br.Opp. 9).[4] The significance and cognizability of this constitutional violation is thus undisputed.

Second, McCalden never denies that this derogation of the First Amendment is easily cured by the application of a heightened pleading standard. Following the principle announced in *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), that the application of tort sanctions must "be measured by standards that satisfy the First Amendment," at least four circuits have adopted a heightened standard for complaints such as McCalden's, but the court below broke with precedent and rejected such a standard. *See* Petition at 19-21 & n. 14. As the brief *amicus curiae* of the Anti-Defamation League makes clear, vital expression on public issues will often impair the contractual relationships of others — indeed, in political boycotts, labor disputes and public awareness campaigns, such interference is frequently its purpose.

It is undisputed that the only even arguably actionable allegation the court below could find in the complaint — the threat to hold a demonstration that could turn disruptive (A9) — "occurr[ed] in the context of [petitioners'] constitutionally protected activity" of opposing McCalden's ideas. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). In this context, "precision of regulation" is mandated by the First Amendment. *Ibid.* Such precision is totally lacking in the decision below.

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[4] In the companion petition for writ of certiorari in No. 91-1699 at 15, McCalden similarly acknowledges the "chilling effect" his lawsuit will have on the defendants' First Amendment rights. McCalden offers only the strange defense that at least defendants can console themselves with the fact that they prevailed in the political arena over McCalden, who lost an audience for his pernicious views. But this only confirms, rather than compensates for, the First Amendment violation, for it is precisely that victory in the marketplace of ideas that McCalden seeks to undo by invoking the power of the federal courts to punish his opponents with an award of damages.

CONCLUSION

By ruling that parties may be held liable merely for having threatened to organize a demonstration that, according to plaintiff's speculations, might have gotten out of hand and caused some damage, the decision below makes deep inroads on the sphere of robust and passionate expression that the First Amendment was written to promote and defend. By allowing McCalden to proceed on the allegations in this complaint, the decision below — as the dissenting judges noted (Petition 19-22) — conflicts sharply with the decisions of other circuits and with the abiding principles of the First Amendment. A writ of certiorari should be granted.

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